TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1950

No. 66

ALFRED F. DOWD, AS WARDEN OF THE INDIANA STATE PRISON, PETITIONER,

vs.

THE UNITED STATES OF AMERICA, EX REL. LAWRENCE E. COOK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 8, 1950.

CERTIORARI GRANTED OCTOBER 16, 1950.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 66

ALFRED F. DOWD, AS WARDEN OF THE INDIANA STATE PRISON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA, EX REL., LAWRENCE E. COOK,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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In the

United States Court of Appeals

For the Seventh Circuit

No. 9909

THE UNITED STATES OF AMERICA, EX REL.,
LAWRENCE E. COOK,
Petitioner-Appellee,

vs.

ALFRED F. DOWD, AS WARDEN OF THE INDIANA STATE PRISON,
Respondent-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.

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TRANSCRIPT OF PROCEEDINGS.

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RESPONDENT'S EXHIBIT.

1 IN THE UNITED STATES DISTRICT COURT,

Northern District of Indiana,

South Bend Division.

Pleas And Proceedings had before the Honorable Luther M. Swygert, Judge of the United States District Court, for the Northern District of Indiana, at a term of said court, begun and held in the United States Court House in the City of South Bend, Indiana, to wit:

United States ex rel.,
Lawrence E. Cook,
Relator,
vs.
Ralph Howard, as Warden of the
Indiana State Prison,
Respondent.
} No. 853 Civil.

Be it remembered that heretofore on the 13th day of November, 1947, the above named petitioner, by his attorney, William Isham, filed in the office of the Clerk of this court, a motion to proceed in forma pauperis, together with a petition for a writ of Habeas corpus, which motion to proceed in forma pauperis and petition for writ of Habeas corpus read in the words and figures following, to wit:

2 MOTION TO FILE AND PROCEED IN FORMA PAUPERIS ON TYPEWRITTEN PAPERS.

Your relator, Lawrence E. Cook, respectfully moves this honorable court for permission to file the attached application for writ of habeas corpus and to proceed thereon in forma pauperis on typewritten papers for the following reasons, to wit:

1. That he was born in the United States of America and is a citizen thereof residing in the State of Indiana as a prisoner in the Indiana State Prison.

2. That relator is a pauper prisoner unable to pay the customary filing fee to file said application in this court

for the reason that he does not have more than nine dollars in money unincumbered and no property of over and above the value of ten dollars and cannot beg, borrow or otherwise procure the money or means to pay said fee and prosecute said application.

3. That relator varily believes and on such belief avers that he has a good meritorious cause of action arising under the Constitution and the laws of the United States.

Wherefore, relator respectfully moves this honorable court for an order permitting him to file said application in forma pauperis and without cost to him and an order permitting him to proceed on typewritten papers in forma pauperis and for all other proper relief in the premises.

Respectfully submitted,

Lawrence E. Cook,
Relator.

State of Indiana, } ss:
La Porte County. }

Lawrence E. Cook, being duly sworn on oath, deposes and says he has read the foregoing petition subscribed by him and knows the contents thereof and that the same is true as he verily believes.

Lawrence E. Cook.

Subscribed and sworn to this 28 day of October, 1947.

Frank M. Swanson,
(Seal) *Notary Public, La Porte County, Indiana.*

My commission expires: May 24, 1949.

3 Whereupon the Court enters an order granting leave to file in forma pauperis, the petition for writ of Habeas corpus is ordered filed and the respondent is ordered to show cause why a writ of habeas corpus should not be issued, hearing is set at Hammond, on November 18, 1947 at 10:00 A. M. which order reads in the words and figures following, to wit:

4 IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Indiana,

South Bend Division.

United States ex rel.,
Lawrence E. Cook,

vs.

Ralph Howard, as Warden of the Indiana State Prison.

Swygert, J.
No. 853 Civil.

ORDER.

Petitioner files motion to proceed in forma pauperus. Motion granted. Application for habeas corpus filed, together with acknowledgement of service on The Attorney General.

The respondent is ordered to show cause why a writ of habeas corpus should not be issued.

It is further ordered that a hearing on this show cause order shall be had at ten o'clock A. M., November 18th, 1947, in Hammond, Indiana.

5 IN THE UNITED STATES DISTRICT COURT.
• • (Caption—853) • •

PETITION FOR A WRIT OF HABEAS CORPUS.

(Filed: November 13, 1947. Margaret Long, Clerk.)

To The Honorable Presiding Judge Of The Above Entitled Court:

Comes now the United States of America on the relation of Lawrence E. Cook and complains of the respondent, Ralph Howard, as Warden of the Indiana State Prison, and for cause of action arising under the Constitution and laws of the United States of America herein, says:

1. That this court has jurisdiction of this application for writ of habeas corpus under and by virtue of Title 28 U. S. C. A., Sections 451 and 452 of the laws of the United States of America.

2. Your relator is unlawfully imprisoned, restrained of his liberty and detained in the Indiana State Prison, Michigan City, LaPorte County, Indiana, under color of authority of the State of Indiana, and is in the custody of said respondent, Ralph Howard, as Warden of said prison, which is located within the territorial jurisdiction of this court. The sole claim and authority by virtue of which respondent so restrains your relator is a commitment of the Jennings County Indiana Circuit Court (hereinafter referred to as the trial court) made and now held by respondent under the following circumstances:

6 3. That on the 23rd day of July 1931 relator was adjudged guilty of murder and sentenced to said prison for life by said trial court.

4. That on the 24th day of July 1931 relator was transported to and confined in said prison where he has since been and now is confined, except for short periods of time when he was removed from said prison for court appearances, hospitalization and to submit to a lie detector examination.

5. That within six months from rendition of said verdict and judgment and within the time then allowed by law for appealing in such cases and with the help of fellow prisoners relator prepared notices of appeal, praecipe for

transcript of record, an assignment of error and a motion to appeal as a poor person and for appointment of counsel.

6. That within six months after the rendition of said judgment your relator gave said appeal documents to employees of said prison with request that they be mailed to said trial court and the Indiana Supreme Court.

7. That relator was informed by the Warden of said prison, Walter H. Daly, and other employees and prisoners of said prison that relator was not allowed to mail or otherwise send said appeal documents out of said prison; that relator was informed the rules of said prison forbid him from sending such appeal documents out of said prison.

8. That the rules and general administrative policy of said prison enforced against your relator throughout his imprisonment therein during the latter part of the year of 1931 and during the entire year of 1932 and for a long time thereafter prevented relator from sending said appeal documents out of said prison.

9. That within six months subsequent to the overruling of the motion for a new trial filed in the trial court, and within the time then allowed by law for filing said appeal documents, the sister of relator for and on behalf of relator made a trip to said prison and asked said Warden to deliver said appeal documents to her for filing or permit relator to mail or otherwise send said appeal documents out of said prison and said Warden refused all of said requests.

10. That on the 6th day of April 1945 relator filed his petition for habeas corpus in the La Porte County Indiana Circuit Court. Said petition was based on the same suppression and denial of his efforts to send said appeal documents out of said prison as herein complained of. The judgment of said court thereon was: "The court having examined said petition and being duly advised in the premises denies same." That on appeal of said cause to the Indiana Supreme Court said judgment was affirmed and the opinion is reported in 64 N. E. 2d 25. That an application for certiorari was made to the United States Supreme Court to review said judgment and certiorari was denied and the denial is reported in 66 S. Ct. 960.

11. That pursuant to the suggestion of the Indiana Supreme Court, at page 27 Notes 4-5 of said Court's opin-

ion reported in 64 N. E. 2d 25, relator petitioned said Court for permission to perfect a delayed appeal to said Court from the said judgment of said trial court rendered in 1931. That said petition was entitled, *Lawrence E. Cook* v. *State of Indiana,* Original Action, and num-
8 bered 28,236, and denied but unreported. Said order of denial was filed November 27, 1946. Motion for rehearing was timely filed and subsequently overruled. That an application for certiorari was made to the United States Supreme Court to review said judgment and certiorari was denied and the denial is reported in 67 S. Ct. 981, rehearing denied 67 S. Ct. 1187. That an original application for habeas corpus was made to said United States Supreme Court, Ex Parte Lawrence E. Cook, March 17, 1947, 67 S. Ct. 975, and denied.

12. That during the year 1945 relator filed his application for habeas corpus in this court, *Lawrence E. Cook* v. *Alfred F. Dowd, Warden,* No. 591 Civil, based on the same suppression and denial herein complained of. This court sustained a motion to dismiss based on the proposition that remedies then thought to be available in Indiana had not been exhausted. Said action of this court was sustained by the Circuit Court of Appeals, *Lawrence E. Cook* v. *Alfred F. Dowd, Warden,* March 26, 1946, No. 9055.

13. That on the 5th day of June 1947 the Chief Executive of Indiana refused to extend clemency to relator and denied a petition therefor.

14. That relator is innocent of the offense of which he stands convicted and verily believes he could and would have obtained a reversal of said judgment if Indiana had permitted him to present said appeal documents to said courts and had not suppressed and denied his efforts to send said documents out of said prison. The grounds for said belief are that said verdict was not sustained by sufficient evidence; that said verdict was contrary to law; that the trial court erred in the giving of certain instruc-
9 tions; there was no evidence to prove the corpus delecti; the evidence did not establish venue in said Jennings County; and, the trial court erred in refusing to direct a verdict of not guilty.

15. That by reason of said foregoing acts of Indiana, by and through members of the Executive Branch thereof, in suppressing, frustrating and preventing relator in his efforts to se d said appeal documents out of said prison

and in perfecting said appeal to the Indiana Supreme Court relator has been and now is deprived of the equal protection of the law and his imprisonment is violative of and repugnant to the Fourteenth Amendment to the Constitution of the United States of America.

16. That Indiana has and now is failing and refusing to grant relator any relief from said imprisonment by any procedure provided by Indiana and has therein wholly defaulted and in so imprisoning relator and defaulting, failing and refusing to provide any effective remedial judicial procedure Indiana has and now is denying relator due process of law for want of such effective remedial judicial procedure and relief in contravention of said Fourteenth Amendment.

Wherefore, relator prays that a writ of habeas corpus issue forthwith, directed to respondent Ralph Howard, as Warden of said Indiana State Prison, located at Michigan City, La Porte County, Indiana, commanding him to have the body of said Lawrence E. Cook before this Court at a time therein specified, together with the true cause of his detention, to the end that due inquiry may be had in the premises and that this Court summarily proceed to determine the facts and the legality of relator's imprisonment by respondent and then and there discharge relator without delay or otherwise dispose of relator as the facts, the law and justice require.

Respectfully submitted,
Lawrence E. Cook,
Relator,

William Isham,
Fowler, Indiana,
Attorney For Relator.

10 State of Indiana, } ss.
La Porte County. }

Personally before me, the undersigned officer authorized by law to administer oaths, appeared Lawrence E. Cook, who first being duly sworn, deposes on oath and says he has read the foregoing petition and knows the contents thereof and that the statements made therein are true as he verily believes.

Lawrence E. Cook,
Affiant-Relator.

Subscribed and sworn to before me this 28th day of October, 1947.

Frank M. Swanson,
(Seal) *Notary Public, La Porte County, Indiana.*

My Commission Expires May 24, 1949.

11 Endorsed: In the United States District Court. * * (Caption) * *. Application for Habeas Corpus.

12 Proof of Service.

Received one copy of application for writ of habeas corpus, motion to proceed in forma pauperis and this proof of service this 12th day of Nov. 1947.

Cleon H. Foust,
Attorney General of Indiana,
By Merl M. Wall.

13 And afterwards, to wit, on the 2nd day of December, 1947, the following further proceedings were had in the above entitled cause, to wit:

Comes now the respondent herein, the State of Indiana, by Cleon H. Foust, Attorney General and files a motion to dismiss the petition for writ of Habeas Corpus, together with memorandum thereon, which motion to dismiss and memorandum reads in the words and figures following, to wit:

14 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—853) * *

MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS.

Comes now the respondent herein and moves the court to dismiss petitioner's petition for writ of habeas corpus for the following reasons:

1. The petition fails to state a claim against the respondent upon which relief can be granted.
2. The petition does ont state facts sufficient to entitle petitioner to the relief requested.
3. The petition on its face alleges certain facts which preclude petitioner from his right to the issuance of a writ of habeas corpus.

Cleon H. Foust,
Attorney General,

Frank E. Coughlin,
1st Deputy Attorney General,

Merl M. Wall,
Deputy Attorney General,
Attorneys for Respondent.

15 Memorandum.

The petitioner, in substance, claims that on July 23, 1931, he was convicted by the Jennings Circuit Court of the crime of murder in the first degree and was sentenced by the Court to the Indiana State Prison for life. He claims that within the six month period after his conviction he prepared the proper papers to take an appeal from this conviction, but that the Warden and other employees of the prison informed him that he would not be allowed to send out the appeal papers. He does not allege in his petition that he has been denied the right to file his appeal with the Indiana Supreme Court since 1933 and, as a matter of fact, at any time from that date until the present time he has had the right to file his appeal with the Supreme Court of Indiana and have that matter determined and we believe that under the circumstances disclosed by his petition he has been guilty of laches in not taking such action and, therefore, has not exhausted his remedies in the state of Indiana.

Nowhere in the petition is it alleged that he was not accorded due process of law in his original trial in the Jennings Circuit Court and the only allegation he sets forth is the fact that from his conviction on July 23, 1931, and through the year 1932 he was prevented by the warden and employees of the Indiana State Prison from sending out his appeal papers; such allegations are not sufficient to invoke the jurisdiction of this court in a habeas corpus proceeding since the allegation set forth is a matter to be determined upon appeal and not by habeas corpus.

Since the petitioner has not set forth allegations that he was accorded due process in his trial in the Jennings Circuit Court and since he has not exhausted his remedies by appeal to the Supreme Court of Indiana, the re-
16 spondent submits that the petition is insufficient to invoke the jurisdiction of this court and that the same should be denied and motion to dismiss should be sustained.

Cleon H. Foust,
Attorney General,
Frank E. Coughlin,
1st Deputy Attorney General,
Merl M. Wall,
Deputy Attorney General,
Attorneys for Respondent.

17 And afterwards, to wit, on the 24th day of June, 1948, the following further proceedings were had in the above entitled cause, to wit:

Now here the memorandum opinion of the court on the motion to dismiss is entered, the motion to dismiss is granted and this cause is ordered dismissed, which memorandum opinion reads in the words and figures following, to wit:

18 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—853) * *

MEMORANDUM OPINION ON MOTION TO DISMISS.

(Filed Jun. 24, 1948. Margaret Long, Clerk.)

This case presents a difficult question arising under the Equal Protection clause of the Fourteenth Amendment. It concerns the proper scope of a habeas corpus proceeding in a federal district court pursuant to a petition of a person convicted and sentenced by a state court.

The facts, as alleged in the petition and as developed at the hearing on the motion to dismiss, are as follows: The petitioner was charged and found guilty of the crime of murder and was sentenced to life imprisonment in the Circuit Court of Jennings County, Indiana, on July 23, 1931. He is presently incarcerated in the Indiana State Prison.

It is the petitioner's contention that certain errors took place in the course of his trial which would entitle him to a reversal of the judgment which is the reason for his confinement. He alleges in this petition that after being taken to prison and within the time allowed under Indiana law to perfect an appeal, he prepared certain appeal papers which he attempted to send out of the prison for filing, but that he was prevented by the prison officials from doing so. It also has been contended in other proceedings initiated by the petitioner, to which further reference will
19 be made, that the attorney who represented him at the trial refused to perfect an appeal for him.

Both of these contentions have been in dispute. But

whatever may be the actual facts, it appears that no further action was taken by the petitioner until 1937, when he filed a petition for a writ of error coram nobis in the Circuit Court of Jennings County. The State filed a demurrer to the petition. The trial court overruled the demurrer, granted the petition and ordered a new trial. The State decided to appeal this ruling. A few days later it withdrew its appeal and filed a general denial. Although the court's order in the order book was to the effect that the court's previous judgment granting the petition was withdrawn, the judge's bench docket only reflected the withdrawal of the appeal and the filing of a general denial by the State. The petitioner moved to correct the order book entry so as not to have it reflect the withdrawal of the judgment granting the writ. This motion was denied and the ruling was affirmed. *Cook* v. *State of Indiana*, 219 Ind. 234, 27 N. E. (2d) 63 (1941). Thereafter, the State withdrew its answer and was permitted to refile a demurrer to the petition. This demurrer was sustained, whereupon the petitioner sought to mandate the trial judge to try the issues raised by his petition and the withdrawn answer. The Indiana Supreme Court denied the writ of mandate, ruling that an appeal was the petitioner's proper remedy. *State ex rel. Cook* v. *Wickens*, 222 Ind. 385, 53 N. E. (2d) 630 (1944).

Subsequently, in April, 1945, the petitioner filed a petition for habeas corpus in the Circuit Court of Laporte County, and in June of 1945 he started a similar action in this court. Both petitions were denied. The ruling by the state court was appealed and affirmed. *State* v. *Howard*, 223 Ind. 694, 64 N. E. (2d) 25 (1945) and certiorari was denied by the United States Supreme Court, 327 U. S. 808 (1946).

20 In reviewing the denial of the petition for a writ of habeas corpus by the LaPorte Circuit Court, the Indiana Supreme Court held that the lower court was without jurisdiction to "revise a valid judgment of a court of equal jurisdiction," and that "where constitutional rights, state or federal, are alleged to be invaded or denied, well known remedies are provided, but they must be sought in the court in which the judgment was rendered or in this court on appeal." The higher court then used this significant language:

"If appellant has been denied the privilege of appealing his case, by the warden and employees of the prison where

he is serving, until the time allowed by statute for an appeal has expired, that fact would not nullify the judgment lawfully rendered against him by the Jennings Circuit Court. It would merely extend the time for appeal during the period of such disability. In aid of its appellate powers and functions this court has both inherent and statutory power to entertain and determine a petition to appeal after the time allowed by statute therefor has expired, under the conditions set forth in paragraph one of appellant's complaint."

After this, the petitioner filed a petition in the Indiana Supreme Court to appeal his case. This petition was denied and certiorari to the United States Supreme Court was again sought and denied. Subsequently the petitioner asked for and was denied clemency by the Indiana Clemency Commission. The filing of the instant petition for habeas corpus followed. The State has filed a motion to dismiss the petition.

In his subsequent petition to appeal, the petitioner invoked the proclaimed jurisdiction of the Indiana Supreme Court to grant a late appeal and attempted to support his allegations that he was denied the right to file his appeal papers in 1931 by filing with his petition sundry affidavits. The Attorney General filed affidavits in opposition, primarily on the question of whether the Warden would permit prisoners to mail documents out of the prison. However, one affidavit signed by the petitioner's trial attorney was to the effect that neither he nor his co-
counsel had refused to perfect an appeal "giving as a
21 reason the fact that the defendant was and would be
unable to pay or secure payment of the fees for such service." In denying the petition for appeal, the Supreme Court of Indiana said:

"The Court having examined and considered said petition the answer thereto, and petitioner's reply and all of said affidavits and being duly advised in the premises, finds that the basic allegation of said petition to-wit: that petitioner's counsel refused, without pay, to take an appeal is not true, and that petitioner is entitled to no relief herein."

Thus, it will be seen that the question presented by the petitioner, and by the various affidavits filed by him and the State as to whether he was prevented by the prison authorities in his own efforts to file an appeal from the prison, was not passed upon by the Indiana Supreme

Court. And despite the State's opposition to the petitioner's contention on this point in the action before the Indiana Supreme Court, the Attorney General conceded during his argument on the motion before this court that during the period when the petitioner says he attempted to file his appeal papers, the prison officials did refuse the inmates' requests to send such documents from the institution.

It will be noted that the petitioner does not claim that the judgment of the Jennings Circuit Court is void by reason of any lack of due process of law in the proceeding which led to that judgment and his subsequent commitment to prison. His complaint is that he was and in fact still is prevented from having that judgment reviewed on appeal.

It is definitely established that the right to have a criminal conviction reviewed by an appellate court is not a necessary element of due process of law. *McKane* v. *Durston,* 153 U. S. 684 (1894). Indeed, the petitioner does not contend otherwise. He bases his petition for a writ of habeas corpus on the claim that he was denied by the State of Indiana, through officers of its executive branch, namely, the prison officials, from having the equal right afforded to all other persons convicted of crimes in Indiana to prosecute an appeal.

22 It would appear that his contentions make out a valid claim that the equal protection clause of the Fourteenth Amendment was violated, and particularly is this pointed up by the concession made by the Attorney General that during a period prior to 1933 the inmates of the Indiana State Prison were restricted from sending out appeal papers and also by the petitioner's frustrated efforts to perfect a belated appeal in 1946. On the basis of this claim of a denial of the equal protection of the laws of Indiana, the petitioner maintains that a writ of habeas corpus is his proper remedy and he cites as authority *Cochran* v. *Kansas,* 316 U. S. 255 (1942).

Before reaching any final conclusion, the problem thus presented must be analyzed in relation both to the extraordinary remedy sought in this proceeding and the particular court wherein it is sought. That analysis must begin by considering the right which the petitioner claims was denied him, namely, a right to appeal. The judgment of conviction which he had the right to attack on appeal was valid on its face and will remain valid unless it is reversed

on appeal. An appeal might or might not result in a reversal. Having only the mere assertion of a denial of the right to appeal, any prediction as the success or failure of an appeal is to indulge in pure speculation. Yet, if the petitioner were to prevail in this proceeding, he would be entitled to a discharge from further restraint, notwithstanding his sentence to life imprisonment based on a presumptively valid judgment. This proceeding cannot be a substitute for the appeal to which the petitioner was entitled and which he says was denied him, nor can it be the means of bringing about a belated appeal. He was and still may be entitled to a review by the Indiana Supreme Court of the judgment upon which he was committed, but he is entitled to nothing more. He would receive something far different, namely, his full release, were he to succeed in this proceeding and the writ should issue.

23 The problem thus is narrowed to a determination of whether the wrong done him by the denial of his privilege to appeal his case, if such be the fact, justifies the drastic and extraordinary remedy that he seeks in this action. While keeping in mind the holding in the Cochran case to the effect that the suppression of an appeal is a violation of the Equal Protection clause, it would appear that the denial of the mere technical right to an appeal ought not be the basis of a complete discharge from further restraint. Only where it is established to the satisfaction of the court hearing the habeas corpus that, had the prisoner been afforded his right to appeal, substantial error could have been brought to the attention of the appellate court which probably would have resulted in a reversal, ought the violation of the constitutional guaranty of the Equal protection clause be the means of effecting a full release. Otherwise, substance would be subordinated to form and the violation of a bare technical right would be a prisoner's avenue of escape from just punishment.

In this connection a distinction should be made between the relative effect of the Due Process clause and the Equal Protection clause of the Fourteenth Amendment. It is axiomatic that at all stages before conviction the defendant is presumed to be innocent. Upon conviction, that presumption turns into one of guilt. Because of this shift of presumption, the convicted person had a burden to show that had he been afforded the equal protection of the laws in regard to his right to an appeal it probably would have

altered his position, whereas he has no like burden in regard to a failure of due process prior to his conviction.

In his petition for habeas corpus, the petitioner lists the grounds which he claims would have resulted in a re-
24 versal had he been permitted to appeal his case. The grounds which he lists are that the verdict was not sustained by sufficient evidence; that the verdict was contrary to law; that the trial court erred in the giving of certain instructions; that there was no evidence to prove the corpus delicti; that the evidence did not establish venue to Jennings County; and that the trial court erred in refusing to direct a verdict of not guilty. Aside from a mere listing of these alleged errors, there is nothing else said about them, either in the petition before this Court or in the transcript filed in the United States Supreme Court seeking certiorari in the proceeding before the Indiana Supreme Court for permission to file an appeal. There is no showing whatever that they are of substantial character and that there is probable cause to believe that the petitioner would have obtained a reversal upon an appeal.

This is the test which, in my opinion, should be applied before the suppression of appeal papers and the consequent violation of the Equal Protection clause of the Fourteenth Amendment can be made the basis for granting a writ of habeas corpus.

Buttressing the conclusion reached in this case, but not controlling factors in themselves, are these other facts: The petitioner waited six years after his unsuccessful attempt to appeal before making any further moves to gain his freedom; petitioner fails to allege the existence of the appeal papers he says he was forbidden to send out of prison, or to account for their loss; and he was represented by two members of the bar at his trial, one of whom later became a circuit court judge. It is only reasonable to assume that these counsel, impelled either by standards of professional integrity or by common human decency, would have undertaken an appeal, regardless of whether they were compensated, if reasonable grounds had existed to believe that an appeal would have been effective or that there had occurred a rank miscarriage of justice.

25 Another ground urged by the respondent for dismissal of the petition is that the petitioner has not yet exhausted his state court remedies, and that therefore, this court lacks jurisdiction. Inasmuch as the petitioner has

been denied the right to prosecute his appeal pursuant to the pronouncement by the Indiana Supreme Court in the habeas corpus action initiated in LaPorte County; and further, since he has failed in his efforts to have that denial reviewed on certiorari by the United States Supreme Court, it would appear that he has met the test laid down in *Ex Parte Hawke*, 321 U. S. 114 (1944) for bringing a petition of habeas corpus in the federal court. Particularly is this true when it is considered that the Supreme Court of Indiana failed to pass on the issue as to whether the petitioner had been denied the right to appeal *in propria persona* as raised in his petition for leave to appeal and that now the respondent, through the Attorney General, admits that it was the practice of the prison officials to suppress appeal papers and related documents at the time the petitioner claims he first attempted to appeal his case.

Notwithstanding the determination that jurisdiction exists, the Court is not unaware of the care and restraint with which that jurisdiction must be exercised. "The power conferred on a federal court to issue a writ of habeas corpus to inquire into the cause of the detention of any person asserting that he has been in custody by the authority of a state court in violation of the Constitution, laws or treaties of the United States, is not unqualified, but is to be exerted in the exercise of a sound discretion. The due and orderly administration of justice in a state court is not to be thus interfered with save in rare cases where exceptional circumstances of peculiar urgency are shown to exist." *Boyd* v. *O'Grady*, 121 F. (2d) 146 (C. C. A., 8th, 1941). Likewise, "Federal jurisdiction is to be exerted only in exceptional cases involving such an emergency
26 or great urgency as necessitate action to prevent irreparable injury. The jurisdiction to interfere with the proceedings of state governmental bodies charged with the prosecution and punishment of offenders is an exceedingly delicate one to be exercised with the greatest of care and nicest sense of propriety. In the absence of the exceptional circumstances mentioned, a sense of comity and due regard for state jurisdiction demand that the applicant be left to his remedies with the state courts who, no less than those of the United States, are charged with the obligation to recognize and protect his constitutional rights." *Kelly* v. *Dowd*, 140 F. (2d) 81 (C. C. A., 7th,

1944). Other federal appellate courts have expressed the same doctrine. In reaching the conclusions heretofore indicated regarding the constitutional question involved, the Court has had in mind these admonishing pronouncements of the higher courts.

The motion to dismiss is granted and the Clerk is directed to enter an order to that effect.

Luther M. Swygert,
Judge.

Hammond, Indiana, June 24, 1948.

27 It is therefore considered and adjudged by the Court, that the respondent's motion to dismiss be, and the same hereby is granted, and this cause be, and the same hereby is dismissed.

And afterwards, to wit, on the 13th day of October, 1948, the following further proceedings were had in the above entitled cause, to wit:

Comes now the petitioner herein, and files a motion for leave to file and amended petition for writ of Habeas corpus, together with proof of service of motion for leave to amend and amended petition for writ of habeas corpus and consent of Attorney General to granting of said motion, which motion for leave to file amended petition for writ of habeas corpus, and proof of service of said motion read in the words and figures following, to wit:

MOTION FOR LEAVE TO FILE AMENDED PETITION FOR WRIT OF HABEAS CORPUS.

The petitioner, Lawrence E. Cook, by Fraser & Isham, his attorneys, moves the court for leave to file his amended petition for writ of habeas corpus in the above entitled cause.

Fraser & Isham,
Attorneys for Petitioner.

PROOF OF SERVICE OF MOTION FOR LEAVE TO AMEND AND AMENDED PETITION FOR WRIT OF HABEAS CORPUS.

William E. Isham, being first duly sworn, on his oath says that he is of counsel for petitioner, Lawrence E. Cook, and that on the 8th day of October, 1948, he served a copy of the attached Motion for leave to amend and the amended petition for writ of habeas corpus by delivering true copies thereof to Mr. Frank Coughlin, Deputy Attorney General of the State of Indiana, at the State House, Indianapolis, Indiana.

William S. Isham.

Subscribed and sworn to before me this 8 day of October, 1948.

Eva Bohlinger,
Notary Public.

(Seal)

My commission expires November 1, 1950.

28 Service of copies of the above mentioned pleadings on the 8th day of October, 1948, is hereby acknowledged.

Cleon H. Foust,
Attorney General,
By Merl M. Wall,
Deputy Attorney General.

The Attorney General of the State of Indiana hereby consents to the granting of said motion and the filing of the amended petition for writ of habeas corpus.

Dated this 8th day of October, 1948.

Cleon H. Foust,
Attorney General,
By Merl M. Wall,
Deputy Attorney General.

Q. This is the first time you have seen him since you have been out of the prison?

A. That's right.

Q. Now, you said Mr. Cook talked to you one time in "B" cell house?

A. That's right.

Q. You said you believe it was within ninety days of the time he arrived there?

A. Yes.

Q. Were you in charge of the cell house that day?

A. That's right.

Q. When was it with reference to that day you had this talk with Warden Daly you have told us about?

A. Well, it was before, when I hired in there, I talked to Mr. Daly.

Q. Were there other guards present when he talked to you about the rule?

A. No, sir.

Q. Do you know why he called you in particularly just to discuss this matter with you alone?

A. Well, the Warden lays down certain rules. When they hire a new man they tell you you are on probation
59 for a certain length of time. That is the way it was then. I don't know how it is now. You were on probation for—I don't know whether it was 30 or 90 days then. It seems like it was 90 days. I am not sure of that.

Q. He told you you were on probation?

A. That's right.

Q. What else did he tell you?

A. If I made good I would have a steady job.

Q. What else did he tell you?

A. Well, he just laid down a few rules, the things a person shouldn't do, how easy a guard could get mixed up there.

Q. What, if anything, did he say to you about rules concerning a prisoner's sending out papers?

A. He said it was against the rules of the institution.

Q. Now, as a matter of fact didn't he tell you if anybody did approach you about it, you should refer them to him or the Deputy Warden?

A. I don't remember him saying that.

Q. Wasn't that the usual routine?

A. The usual routine on something minor would be to inform the Deputy Warden.

Q. That is right; and on major things, to inform the Warden, isn't that what you did?

A. On a lot of them, yes.

60 Q. Well, you had no authority as a guard to take papers for anybody out of the prison?

A. I didn't accept them.

Q. You did not have any authority?

A. No.

Q. When you had a situation like that, since you had no authority to do it, didn't you usually refer them to the Deputy Warden or Warden?

A. The reason I didn't was because I was instructed beforehand not to.

Q. Now, you say you were instructed concerning this matter within 90 days after you were there—

Mr. Isham: He did not say that.

Mr. Wall: Withdraw the question.

By Mr. Wall:

Q. How soon after you began as a guard there did you have this talk with Warden Daly in which he instructed you about it?

A. The day that he hired me.

Q. I have forgotten what you said, when you were hired.

A. I can remember it was on a Wednesday morning, October 1, 1930.

Q. October 1st?

A. That's right.

61 Q. How long after that was it, if you recall, Mr. Cook spoke to you about sending something out of the prison?

A. I would say it was 60 to 90 days. It has been seventeen years ago.

Q. That is your best recollection?

A. That's right.

Q. Was there any written rule to that effect?

A. They used to have a little pamphlet, a few of the rules over there, but, to my knowledge, that wasn't in there.

Q. As far as you know, this rule you have been talking about was not written?

A. That's right.

Q. Why didn't you tell Mr. Cook at that time he would

have to see some higher superior officer about that matter?

A. Well, just because I was told it was against the rules, and that's why they hired the guards over there; if they could handle things like that, they wouldn't be bothering the Warden or Deputy Warden.

Q. I want to ask you this, isn't it true that that conversation you say you held with the Warden about prisoners not sending papers out of the prison arose because of a Mr. D. C. Stephenson having attempted prior to that time to smuggle legal papers out of the prison?

A. I wouldn't know anything about it.

62 Q. I am asking you if that was not said, that that was the reason.

A. He had a little trouble over there, but I don't remember whether that was the reason, or not, to tell you the truth.

Q. To tell the truth about it, wasn't that generally known among the guards, after Stephenson had made some attempts to smuggle papers out the Warden may have told you this, that anybody wanting to send papers out would have to be referred to the Warden?

A. No, he didn't tell me that.

Q. Well, you did understand generally, you and the rest of the guards, that was what he meant by that order?

A. Well, I wouldn't say that I did. Like I say, he instructed me, and I tried to follow that to the letter.

I knew Stephenson had trouble over there, but what it had been about, it was before I got there. There was a lot of changes in guards, so forth, and so on. Like I say, there may have been conversation I don't remember. I didn't pay much attention to it, to tell you the truth.

Q. Isn't it true you did later on learn, after that statement made to you by Warden Daly, that the rule was those things should be referred to the Warden in order that they might have a record of what was being sent

63 out of the prison?

A. That would be the natural procedure. I couldn't just take any papers out the front gate, take them home, and send them to the lawyer. I would be violating the law of the institution.

Q. You did understand then, didn't you, when a prisoner would ask you about papers, he would have to go, at least, to the Warden?

A. Well, I never did that. Like I say, when I started there, the Warden took me into his office, told me there would be no papers sent out. The fact of the matter is, if a man put in a petition to see the Warden, if he was called in ninety days or four months, he was lucky.

Mr. Wall: I move the latter part of the answer be stricken out, as wholly unresponsive to the question.

Mr. Isham: I think it is responsive.

The Court: It is not responsive.

Motion granted.

By Mr. Wall:

Q. Did you learn at any time prior to your quitting the institution as guard that that was the real meaning of that rule, unwritten rule, that matters, instead of being outright refused, must be referred to the Warden?

64 A. Well, on some things, yes, I would say.

Q. Among some things didn't that include a request to send papers out of the prison?

A. I would say no, because they wouldn't listen to it, and, after all—

Q. When you say "they wouldn't listen to it," who do you mean?

A. If the Warden told me not to accept any papers, I wouldn't want to do it, take them up to the Warden's office, after he told me not to. I would consider myself bothering the man.

Q. You tell me he said not to bring the papers?

A. No; when he took me to his office, he told me that was against the rules of the institution.

Q. What was against the rules?

A. Carrying a man's papers, and so forth, appeal papers, whatever they were, writs.

Q. By the guards, isn't that right?

A. That's right.

Q. So he told you you couldn't take them out?

A. Anybody couldn't; not me personally, anybody.

Q. You were included among all of the rest of them?

A. That's right.

Q. He did not say he could not or would not send

65 them out as Warden?

A. He said it was against the rules of the institution.

Q. For you or any other guard to take them out?

A. No, he didn't say that at that time.

Q. I don't want to dwell on it, but will you tell us once again what he told you?

A. He told me there would be no papers sent out of there, because it was against the rules of the institution.

Q. I will ask you once again, didn't you understand that to refer to the fact that you or no other guard should take papers out of there.

A. No, I didn't understand it that way.

Q. What did you understand?

A. I understood it was against the rules of the institution to send any papers out of the institution prepared by the inmates.

Q. Do you know whether any of the inmates ever went in to see the Warden about such matter?

A. No, I couldn't say that definitely.

Q. That is right. Perhaps many of them did, as far as you are concerned; isn't that right?

A. Like I say, I couldn't say that. I was in and out of there, worked out on the farms, and I worked on the front gates several times on Sundays. The Warden
66 was never there on Sundays.

Q. Will you tell us how you happen to remember this in such detail after the lapse of eighteen years, this conversation?

A. Lawrence Cook isn't the only one that asked me. When I was working in the mail room there was a fellow—

Q. When, what time were you in the mail room?

A. Oh, that was during that time, a little later on, I would say in the spring of 1932, maybe April or May, I don't remember exactly, but there was a fellow, I can't think of his proper name, we used to call him Preacher, he was an elderly man, about sixty, he always had something he wanted to see the Warden or Deputy about. At that time they didn't have the new gates in there, and where my seat was there I watched the visiting tables; there was just bars between the gates, and I asked Mr. Daly once about that matter.

Q. Where was Mr. Daly at that time?

A. He was between the gates.

Q. Well, you said other people asked you. Can you name any other of the prisoners?

A. This other fellow I remember distinctly; they called him Preacher over there. He was an elderly man about 60 years old.

Q. That is one. Can you name any more?
67 A. No.
Q. Yet you say there were other prisoners who spoke to you?
A. Yes.
Q. Have you talked to Mrs. Cook, Mr. Cook's sister, about this matter?
A. Yes.
Q. When did you first talk to her about this matter?
A. Oh, she wrote me a letter about a year ago, I think it was.
Q. That was the first time?
A. That's right. I never knew the lady before in my life.
Q. You have seen her in person since that date?
A. Yes.
Q. And you made an affidavit, didn't you, for her, and which was included in some appeal he was trying to take to the Supreme Court of the State of Indiana?
A. It was, yes.
Q. Do you remember the date you gave her that affidavit?
A. I do not.
Q. Do you know what year it was in?
A. It was a year ago, I think, around that neighborhood, maybe a little more, or less.
Q. Did you make that affidavit in this county?
A. LaPorte County.
68 Q. Now, you say that this rule that was unwritten, but that you understood to be a rule, was in force for a year or two after the event you have been speaking of?
A. Yes.
Q. Well, you were still working at the institution when Mr. Kunkle became Warden?
A. That's right.
Q. Were you on duty the day he called all of the prisoners into the chapel or some meeting place and spoke about some rule?
A. I was there, but I wasn't in the chapel.
Q. Well, you learned about what he said immediately afterwards, didn't you?
A. Yes, I did.
Q. You know, as a matter of fact, that some investigation was made concerning whether or not there ever had been such a rule prior to his appointment as Warden?

A. I don't remember that distinctly, other than what I heard among the men that were in there.

Q. Wasn't it your understanding, as well as other members employed there, he made some investigation and found there was no such rule in effect during the time you have been telling about?

A. I couldn't say that.

69 Q. You don't know a thing about it?

A. I couldn't say that, that he made an investigation and found there was nothing to it.

Q. You don't know whether or not, immediately after he became Warden, prisoners were permitted to send papers out?

A. It was shortly afterwards.

Q. How soon, would you say?

A. Well, now, I would have to guess at that.

Q. All right. It was the same year, or later?

A. Yes, the same year.

Q. That would be in 1933, wouldn't it?

A. Yes.

Q. Well, after that time, during the period you were still at the institution, did Mr. Cook again offer you papers to send out of the prison?

A. Not that I recall.

Q. Or did you have any conversation with Cook, in which you told him the rule had now been changed and he could send them out?

A. No, sir.

Q. Did you have any experience with any other prisoner during that period of time who asked you to forward papers or take them out?

A. No, sir.

70 Q. You know, as a matter of fact, after Mr. Kunkle went in, no guard had the right to take papers out for prisoners?

A. That is right; you are right.

Q. You know, as a matter of fact, all such papers after that were referred to the Warden's office, don't you?

A. Yes.

Q. What happened to them, you never knew about?

A. No.

Q. That was not any part of your business, was it?

A. No, you are right.

Q. And isn't it further true after Warden Kunkle

came in it was not any part of your business to take papers for prisoners even up to his office?

A. Well, that is the truth, yes.

Q. All right. Yet you are very distinct and clear about what Mr. Cook told you that day, about asking to send some papers out?

A. Yes.

Q. He wanted you to take them out, didn't he?

A. No, he didn't.

Q. He just asked about whether they could be sent out?

A. That's right.

Q. You say you did not see what he had in his hand?

A. No, I didn't.

Q. Were there other people present when he made
71 the statement to you?

A. To my knowledge, there wasn't.

Q. Did you report the fact of your conversation to the Warden or Deputy Warden?

A. No, I didn't.

Q. Had you done anything prior to that time about taking or sending papers out of the prison for other prisoners?

A. No, sir.

Q. Do you know why Mr. Cook spoke to you about it on that particular day?

A. Well, I couldn't say that, other than that he wanted to see that the papers got out to the Warden's office. Like I told him, it was against the rules of the institution.

Q. Had he ever asked you prior to that time about sending papers out?

A. No, sir; to my knowledge, he didn't.

Q. Did any other prisoner ask you, in his presence, about sending papers out?

A. Not that I know of.

Q. You didn't bother your head particularly about that phase of it, did you?

A. No, sir.

Q. It was no part of your duties?

A. No.

72 Q. If a prisoner sent papers up to the Warden, you were not called in to say anything about the papers, or your opinion was not asked for, as to whether they should go out?

A. Sometimes, very briefly, if a man was working for a

certain officer, the Warden might call you in, as to his character, so forth, and so on.

Q. I mean with reference to whether certain papers should be sent out.

A. That is right.

Q. You were not?

A. That is right.

Q. So since some time in 1933, as far as you know all prisoners were granted the right to send papers, appeal papers, any legal papers, out of the prison?

A. I couldn't say all were; I have no knowledge of that.

Q. As far as you know?

A. That is right.

Q. As far as you know, was there any reason why Mr. Cook could not have prepared and sent out his papers after that rule went into effect?

A. I couldn't say to that.

Q. He never spoke to you afterwards about it?

A. No, he didn't.

Q. You don't know anything about what efforts, 73 if any, he made to get papers out?

A. I don't know anything about it.

Q. Isn't it true you were called into the Warden's office and cautioned about taking papers, as well as other guards, cautioned about taking papers out?

A. The only time I was in the Warden's office was when I was hired there.

Q. Were you discharged from the prison?

A. No, sir.

Q. You quit voluntarily?

A. I quit of my own accord.

Q. Had no trouble with the Warden?

A. Absolutely not.

Q. It is true, isn't it, Mr. Marks, all of the mail and papers going out from the prison at the time you were there were censored by the prison officials?

A. Well, when I was there they weren't all censored by the prison officials.

Q. They were, or were not?

A. Were not. They had a man, who was a mail clerk, who had certain inmates working for him at that time.

Q. Wasn't it the general rule that all matters going out be censored before they left the institution?

A. Yes.

74 Q. The rule you are talking about applied to post-cards, letters, anything?

A. Yes.

Q. It did not apply just alone to legal papers?

A. Well, legal papers, like I say, they would have stopped, if they had got up that far.

Q. Did you ever know of a case where they were stopped when they got up that far?

A. I probably do, but I don't remember any individually, anything like that. I used to help read the letters incoming and outgoing.

Q. I am not talking about letters; I am talking about legal papers.

A. Offhand, I can't tell you.

Q. You don't know whether they were stopped, or not, whether any were stopped?

A. I don't know; I imagine there was.

Q. Not what you imagine. You don't know?

A. I will have to say I don't know, because—

Q. Well, you say you told Mr. Cook it was against the rules to send anything out. Would you have done the same if he handed you a postcard?

A. That's right.

Q. So the rule you are talking about applied to
75 everything, as far as you know?

A. He wouldn't ask me to take a postcard, because a postcard would be sent to the mail room.

And if those papers should have went to the Warden's office, they would set them aside in the mail room, to go to the Warden's office. In other words, there wasn't supposed to be any papers sent out.

Q. Do you mean postcards, letters, or anything?

A. Postcards would be sent. I would say the regular procedure—I am just telling you the way it was handled—if papers were sent out, dropped in the mail room, they would either have been torn up or the inmate would have been called in by the Warden or Deputy Warden, asked why he done that, because it was against the rules.

Q. In neither event would they hand them to you, whether it was a postcard or letter, would they?

A. No.

Q. That was not the method they used?

A. They had different men who would pick up the mail, stuff like that.

Q. Do you know why Mr. Cook asked you about this

paper, the papers he had in his hand, instead of giving them to the mail men?

A. He probably done that in ignorance.

76 Q. You don't know whether he did?

A. I am just saying probably he didn't know the rule of the institution.

Q. You did not tell him, well, this must go to the post man or somebody designated to pick those matters up, did you?

A. No, I didn't.

Q. You could have properly said that to him?

A. No, I couldn't, not for any papers. Like I said, it was against the rule of the institution.

Q. How did you know what kind of papers they were, if you did not see them?

A. He told me.

Q. What did he tell you?

A. They were appeal papers.

Q. Now, you remember he said something about appeal papers?

A. Like I said, the papers were rolled up. I didn't take the papers. Like I told you, it was against the rules.

Q. Do you mean to say Mr. Cook told you. "These are appeal papers"?

A. I couldn't swear to that. They were papers of some proceedings in court, legal papers, something like that.

Q. He said something like that to you?

A. Yes.

Q. You thought it was a rather serious situation,

77 from what he said to you?

A. No, I wouldn't say it was. After all, like I say, you have to go by the rules or you won't work there. At that time the depression was on.

Q. What did the depression have to do about sending out papers?

A. It meant my job.

Q. You mean if you violated the rule?

A. That's right.

Mr. Wall: That is all.

Redirect Examination by Mr. Isham.

Q. Before telling you about these appeal papers, had you had any conversation with Mr. Cook in which he told you something about he was going to take an appeal, and so on?

A. Well, like I said, all of the new men come in "B" cell house there. After all, men, when they first come in, are worried, and a lot of times they tell you their troubles, stuff like that. I don't remember just exactly; he might have said that to me, but I am not positive of it.

Q. At the time you saw these papers, did he tell you that he was trying to get an appeal?

A. Yes.

78 Q. And that these papers in his hand related to some legal papers in furtherance of that appeal?

A. Yes.

Q. You don't intend to leave the impression, do you, Mr. Marks, that the same rule obtained with reference to mail and legal papers that were prepared in the prison?

A. No, I don't. Like I say, legal papers wasn't—in other words, they were supposed to be abolished; they weren't supposed to originate inside of the institution at all.

Q. A while ago, in answer to a question propounded to you, you referred to the method by which a prisoner could contact the Warden. Suppose a prisoner wished to have a conference with the Warden, what would be the procedure?

Mr. Wall: If he knows.

A. He would put in a request. If the Deputy Warden okayed that, then that would be sent to the Warden's office, and then the Warden was supposed to call the man in.

Q. Under Daly, what was the practice as to how quickly those requests were acted upon?

A. I would say it was very lax.

Q. You mean by that what?

A. That he did call very few men out there.

Q. What would you say as to the period of time intervening from the time they made the request until they

79 got to see the Warden?

A. I would say 30 to 60 days, sometimes 90 days.

Q. Reference was made to a meeting when there was a change of Wardens and Mr. Kunkle got in there. Was it your understanding that there was a change of rules at that time, too?

A. That's right.

Q. And that change of rules relating to legal papers was what?

A. Well, they could be prepared and sent out through the Warden's office.

Q. Did you hear men discussing that after the meeting?
A. I did, yes. I didn't attend the meeting in the chapel at all; I wasn't there.
Q. But you heard inmates discussing that?
A. That is right, and officers, both.
Q. Did they say to you in effect that there was a new change of rules in regard to legal papers?
A. Yes. The fact of the matter is, I knew it, after I discussed it.
Q. And after that action, you never had any occasion to tell a man he could not send out legal papers because it was against the rules of the institution?
A. That's right.
Q. Your understanding of the rule during Mr. Daly's regime was that there was an absolute prohibition on
80 prisoners sending out of the prison legal papers they had prepared?
A. That is right.
Mr. Isham: That is all.

Recross Examination by Mr. Wall.

Q. Would you have given the same answer to Mr. Cook under Mr. Kunkle's regime as you would under Mr. Daly's regime about sending out papers?
A. You mean after Mr. Kunkle was in there?
Q. Yes.
A. I would have told him, probably, to take the usual procedure, send it to the mail room and then have it forwarded to the Warden's office.
Q. Well, that was the procedure, as I understand it, even when Mr. Daly was Warden, wasn't it?
A. No, it wasn't.
Q. You mean men were prohibited from going through the mail room, sending things up even to the Warden's office?
A. They sent the mail there, but, like I said before, there was no papers sent out because it was against the rules of the institution.
Your mail went out to the mail room, was sent out from there.
81 Q. Let me ask you how you know no pleadings of any kind were ever sent up to the Warden.
A. There probably was; I don't remember it. After all, I didn't work out in front all of the time.

Q. You didn't work out in Mr. Daly's office, did you?
A. No. When I worked in the mail room or front gate, I was right there.
Q. So you can't tell this Court whether or not any legal papers went up to him or were sent out, of your own knowledge?
A. Well, like I say, I couldn't say there was any, only I know this, that he told me that was the rule of the institution, there shouldn't be any prepared or sent out.
Q. I will just ask you once more. Are you sure he did not refer to the fact they should not be smuggled out, but should be sent to his office?
A. No, I have to differ with you there.
Q. I am just asking you.
A. That is right.
Q. You are sure it did not refer to that?
A. That's right.
Q. Because of the smuggling that was done by Mr. Stephenson or other prisoners prior to that?
A. He told me, like I said before, it was against the
82 rules of the institution.
Q. You did say, didn't you, there had been some smuggling out of papers?
A. No, I didn't say that.
Q. What did you say?
A. There might have been some smuggled out, but I didn't say there was any smuggled out.
Q. Let's get down to facts. You know, as a matter of fact, it was common talk—you were one of the guards—those things had been done?
A. As long as that institution will be there, it will be done.
Q. That would make it necessary to have a rule they should go through the Warden's office, isn't that true?
A. I still say—
Q. Answer the question.
The Court: Haven't you gone through this?
Mr. Wall: I wanted to get it very clear about this rule, what idea he had. I am not so clear myself on it from his testimony.
Mr. Isham: I noticed you changed your mind about this rule.
Mr. Wall: I move that be stricken from the record.
83 The Court: It may be stricken.

Mr. Wall: May I be permitted to ask one further question?

The Court: Yes.

By Mr. Wall:

Q. I will make this as simple as I can.

You are sure that what Mr. Daly referred to concerning this rule did mean no papers should be presented even to him as Warden; is that right?

A. I say he told me it was against the rules of the institution, not to send any papers out.

Q. Not to take any papers out?

A. He didn't mean me; it was against the rules of the institution, like I told you before.

Q. That they should not be presented to him, even?

A. Yes, sir.

Mr. Wall: That is all.

Redirect Examination by Mr. Isham.

Q. Do you know whether there was any rule that legal papers prepared by prisoners were not supposed to be in the prisoners' possession during the time Mr. Daly was in there?

A. That is right. I said that before.

84 Mr. Isham: That is all.

(And thereupon the witness was excused.)

LOUIS F. GANSHAW, a witness called on behalf of the petitioner, having first been duly sworn, testified as follows:

Direct Examination by Mr. Isham.

Q. Will you state your name, please?

A. Louis F. Ganshaw.

Q. Where do you live?

A. Michigan City, Indiana.

Q. What is your present occupation?

A. I am retired now, but I worked at the prison for the last thirty-one years.

Q. When did you cease working at the prison?

A. September or October 1, 1946.

Q. Do you remember the date you started in there?

A. September 1, 1915.

Q. Did you work there continuously during that period of time?

A. Yes, sir.

Q. You quit that service of your own volition, your own wish?

A. Yes, sir.

85 Q. Were you working there during the time that Mr. Daly was the Warden?

A. Yes, sir.

Q. Do you remember whether or not the period of his office included the years 1931 and 1932, that is, that he was Warden?

A. He was Warden at that time, yes.

Q. What was your office out there, what did you do?

A. In the first place, I was hired there as an officer, and after that I was put in there as foreman.

Q. During the period of 1931 and 1932, what were you doing at the prison, what was your job?

A. I was holding down a job in the paint shop, had charge of the paint shop.

Q. Did you come to know the gentleman to my left, Mr. Lawrence E. Cook, at the prison some time in 1931 and 1932?

A. I believe I did, yes.

Q. You saw him here this morning for the first time in some considerable while, did you not?

A. I have never seen him since I left the prison. This is the first time I saw the gentleman.

Q. Were you aware of the rule or policy existing at the prison in the years 1931 and 1932, when Mr. Daly was Warden, prohibiting the prisoners from preparing

86 legal papers about their case and sending them out of the prison?

A. Well, what I can tell you, I don't know there was anything posted up there in regards to that, to that effect, but there has been people come to me, Mr. Cook, for one, and told me he tried—

Mr. Wall: We object to what he told you.

Mr. Isham: We will go into that a little later.

The Witness: There was no paper posted up.

By Mr. Isham:

Q. You mean no printed rule?

A. No printed rules that I know of.

And afterwards, to wit, on the 22nd day of October, 1948, the following further proceedings were had in the above entitled cause, to wit:

Come now the parties herein, and appear on the motion for leave to file amended petition for writ of habeas corpus, no objection being entered, the Attorney General consents for leave to file amended petition, leave is granted and the amended petition for writ of habeas corpus is filed and reads in the words and figures following, to wit:

30 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—853) * *

AMENDED PETITION FOR A WRIT OF HABEAS CORPUS

To the Honorable Presiding Judge of the Above Entitled Court:

Comes now the United States on the relation of Lawrence E. Cook (hereinafter referred to as the relator) and complains of the respondent, Ralph Howard, as Warden of the Indiana State Prison (hereinafter referred to as the respondent), and for cause of action arising under the Constitution and laws of the United States herein, says:

1. That this Court has jurisdiction of this application for writ of habeas corpus under and by virtue of Title 28 U. S. C. A., Section 451 and 452 of the laws of the United States.

2. Your relator is unlawfully imprisoned, restrained of his liberty and detained in the Indiana State Prison, Michigan City, LaPorte County, Indiana, under color of authority of the State of Indiana, and is in the custody of said respondent, as Warden of said prison, which is located within the territorial jurisdiction of this Court. The sole claim and authority by virtue of which respondent so restrains your relator is a commitment of the Jennings County Indiana Circuit Court (hereinafter referred
31 to as the trial court) made and now held by respondent under the following circumstances:

3. That on the 23rd day of July 1931 relator was ad-

judged guilty of murder and sentenced to said prison for life by said trial court.

4. That on the 24th day of July 1931 relator was transported to and confined in said prison where he has since been and is now confined, except for short periods of time when he was removed for court appearances, hospitalization, and to submit to a lie detector examination.

5. That relator, by trial counsel, filed his statutory motion for new trial in said trial court within the time prescribed by Indiana law, which motion was in proper form and alleged, among other substantial statutory grounds therefor, "that the verdict is not sustained by sufficient evidence" and "that the verdict is contrary to law" and that the trial court erred in the giving of certain instructions; that said statutory motion for new trial was overruled by the trial court during the month of October 1931; that within six months from the overruling of said statutory motion for new trial and within the time then allowed by Indiana law for appealing to the Indiana Supreme Court in such cases and with the help of fellow prisoners and in the manner prescribed by Indiana law, relator prepared notices of appeal, praecipe for transcript of record for use on appeal, an assignment of error for use on appeal and a motion to appeal as a poor person and a petition requesting the trial court to appoint counsel to act for relator in perfecting an appeal to the Indiana Supreme Court from said judgment for him.

6. That within six months after the rendition of the judgment alleged in paragraph three hereof your relator gave the appeal documents specified in paragraph five hereof, to employees of said prison with request that
32 said appeal documents be mailed to the trial court and the Indiana Supreme Court, all as provided by law.

7. That the rules and general administrative policy of said prison enforced against your relator during the Indiana statutory time for perfecting an appeal from said judgment and for a long time thereafter prevented relator from sending out of said prison the notices of appeal, the praecipe for transcript of record for use on appeal, the assignment of error for use on appeal, the motion to appeal as a poor person and the petition requesting the trial court to appoint counsel to act for relator, all as herein specified in paragraph five. That the Warden of said prison, Walter H. Daly and other employees and prisoners of said prison

informed relator that he was not allowed to mail or otherwise send said documents out of said prison. That by reason of said rules enforced against relator, he was in fact prevented from filing said appeal papers and the petition for the appointment of counsel and obtaining counsel to act for him.

8. That within six months subsequent to the overruling of the statutory motion for a new trial filed in the trial court, and within the time then allowed by Indiana law for filing the appeal documents specified in paragraph five hereof, the sister of relator for and on behalf of relator made a trip to said prison and asked said Warden to deliver said petition for appointment of counsel to act for relator and the appeal documents to her for filing or permit relator to mail or otherwise send said documents and the petition out of said prison. The Warden refused all of said requests. That, thus and thereby, said petition for the appointment of counsel and the appeal documents were never sent from said prison.

9. In October, 1937, relator filed a petition for a writ of error coram nobis in the trial court. The trial Judge
33 having died and trial counsel for relator having been appointed regular Judge of the trial court to fill the vacancy created by the death of the trial Judge and thereby being disqualified to sit as Judge in the matter of the coram nobis petition, a former Judge of the trial court was appointed and qualified to act as Special Judge in the coram nobis matter. This Special Judge had been the regular Judge of the Jennings Circuit Court at the time relator was indicted but not at the time he was tried. The State filed a demurrer to the petition. The Special Judge overruled the demurrer. The State refused to plead further. The Special Judge granted the petition and ordered a new trial and relator returned to the custody of the Sheriff of Jennings County. The State decided to appeal this ruling and served notice of this intention to appeal on relator. A few days later it withdrew its appeal and filed a general denial. Although the court's order in the order book was to the effect that the court's previous judgment granting the petition was withdrawn, the Special Judge's bench docket only reflected the withdrawal of the appeal and the filing of a general denial by the State. The truth of the Special Judge's action as reflected by the bench docket was further confirmed by an affidavit by the Special Judge.

The relator moved to expunge from the order book so much of the entry thereon as reflected the withdrawal of the order granting a new trial. The Special Judge sustained the motion and ordered the objectionable matter expunged from the order book. The State objected by special appearance, claiming that it had filed a motion for a change of venue from the Special Judge and that for this reason he had lost jurisdiction. The motion for change of venue was overruled by the Special Judge. The State obtained a writ of mandate from the Indiana Supreme Court ousting the Special Judge of jurisdiction and directing that a change of venue from the Special Judge be sustained. Another Special Judge was selected and qualified. 34 The State moved for an order returning the relator from the custody of the Sheriff to the Indiana State Prison for alleged safekeeping. The Special Judge overruled the motion but ordered relator removed to the Shelby County Indiana Jail for safekeeping. The relator filed his motion for change of venue from the Special Judge. The motion was sustained. Another Special Judge was appointed and qualified. Again the State filed its motion to return relator to the Indiana State Prison for safekeeping. Relator had no personal knowledge of the filing or disposition of the motion until the same had been filed and ruled on. The Special Judge sustained the motion and ordered that relator be returned to said prison for safekeeping. On the 18th day of June 1938 relator was returned to said prison for safekeeping. This latter Special Judge died without making any further rulings. Another Special Judge was appointed and qualified. The relator moved to correct the order book entry so as not to have it reflect the withdrawal of the judgment granting the writ. This motion was denied and the ruling was affirmed. *Cook* v. *State of Indiana*, 219 Ind. 234, 37 N. E. (2d) 63 (1941). Thereafter, the State withdrew its answer in general denial and was permitted to refile a demurrer to the petition. This demurrer was sustained, whereupon relator sought to mandate the trial court to try the issues raised by his petition and the withdrawn answer for the reason that relator was unable to obtain a complete transcript of the original trial with which to perfect an appeal from the impending judgment denying his coram nobis petition. The Indiana Supreme Court denied the writ of mandate, ruling that an appeal was the relator's proper remedy.

State, ex rel. Cook v. *Wickens*, 222 Ind. 365, 53 N. E. (2d) 630 (1944).

10. That on the 6th day of April 1945 relator filed his petition for habeas corpus in the LaPorte County Indiana Circuit Court. Said petition was based on the same
35 suppression and denial of his efforts to send said appeal documents out of said prison as herein complained of. The judgment of said court thereon was: "The court having examined said petition and being duly advised in the premises denies same." That on appeal of said cause to the Indiana Supreme Court said judgment was affirmed and the opinion is reported in 64 N. E. (2d) 25. That an application for certiorari was made to the United States Supreme Court to review said judgment and certiorari was denied and the denial is reported in 66 S. Ct. 960.

11. That on September 4th, 1946, pursuant to the suggestion of the Indiana Supreme Court, at page 27 Notes 4-5 of said Court's opinion reported in 64 N. E. (2d) 25, relator petitioned said Court for permission to perfect a delayed appeal to said Court from said judgment of the trial court rendered in 1931. That said petition was entitled, *Lawrence E. Cook* v. *State of Indiana*, Original Action, and numbered 28236, and denied but unreported. Said order of denial was filed November 27, 1946. Motion for rehearing was timely filed and subsequently overruled. That an application for certiorari was made to the United States Supreme Court to review said judgment and certiorari was denied and the denial is reported in 67 S. Ct. 981, rehearing denied 67 S. Ct. 1187. That an original application for habeas corpus was made to said United States Supreme Court, *Ex parte Lawrence E. Cook*, March 17, 1947, 67 S. Ct. 975, and denied.

12. That during the year 1945 relator filed his application for habeas corpus in this Court, *Lawrence E. Cook* v. *Alfred F. Dowd, Warden*, No. 591 Civil, based on the same suppression and denial herein complained of. This Court sustained a motion to dismiss based on the proposition that remedies then thought to be available in Indiana had not been exhausted. Said action of this Court was sustained by the Circuit Court of Appeals, *Lawrence E. Cook* v. *Alfred F. Dowd, Warden*, March 26, 1946, No. 9055.

36 13. That on the 5th day of June 1947 the Chief Executive of Indiana refused to extend clemency to relator and denied a petition therefor.

14. That relator is innocent of the offense of which he stands convicted and verily believes he could and would have obtained a reversal of said judgment if Indiana had permitted him to present said appeal documents to said courts and had not suppressed and denied his efforts to send said petition for appointment of counsel and appeal documents out of said prison. The grounds for said belief are that said verdict was not sustained by sufficient evidence; that said verdict was contrary to law; that the trial court erred in the giving of certain instructions; there was no evidence to prove the corpus delicti; the evidence did not establish venue in Jennings County; and, the trial court erred in refusing to direct a verdict of not guilty.

15. That during the Indiana statutory period of time for perfecting the appeal from the judgment specified in paragraph three hereof, and for a long time thereafter, the State of Indiana acting through its executive branch of government denied relator certain rights given him and all other citizens of Indiana by law, namely, the right to perfect an appeal of said conviction to the Supreme Court of Indiana by conforming to the statutes relating thereto: that Indiana refused to permit relator to perfect an appeal in propria persona by refusing to allow relator to send from said prison the documents specified in paragraph five hereof; that during the time last above mentioned, Indiana prevented relator from obtaining counsel to act for him by refusing to allow him to send out of said prison his self-prepared pleading asking the Jennings Circuit Court to appoint counsel to act for him.

That during the time herein specified relator was a
37 pauper defendant; that as such pauper defendant the trial court was required to furnish him with a record to support an assignment of error on appeal, and furnish him with counsel to perfect an appeal, all at the expense of Jennings County; that, under Indiana law, relator was presumed innocent until convicted on a trial free from error which prejudiced his substantial rights; that until such time as relator had such trial and it had been determined on appeal that there was no prejudicial error in the trial or until such time as he voluntarily waived the right to appeal for error, relator was merely the accused and clothed with the presumption of innocence; and, that relator has never waived said right to a fair trial, said appeal for error, and the appointment of counsel to perfect said appeal.

16. That by reason of said foregoing acts of Indiana, acting by and through members of the Executive Branch thereof, in suppressing, frustrating and preventing relator in his efforts to send said petition for appointment of counsel to act for him and said appeal documents out of said prison and in perfecting said appeal to the Indiana Supreme Court, relator has been and is now deprived of the equal protection of the law and his imprisonment is violative of and repugnant to the Fourteenth Amendment of the Federal Constitution.

17. That the State of Indiana, by so preventing relator from sending out of said prison his petition for the appointment of counsel as a poor person to perfect said appeal from said judgment of conviction, denied relator due process of law and denied him equal protection of the laws in violation of the provisions of the Fourteenth Amendment to the Federal Constitution.

18. That Indiana has and is now failing and refusing to grant relator any relief from said imprisonment by any procedure provided by Indiana and has therein wholly defaulted and in so imprisoning relator and defaulting, failing, and refusing to provide any effective remedial judicial procedure Indiana has and is now denying relator due
38 process of law for want of such effective remedial judicial procedure and relief in contravention of said Fourteenth Amendment.

Wherefore, relator prays that a writ of habeas corpus issue forthwith, directed to respondent Ralph Howard, as Warden of said Indiana State Prison, located at Michigan City, LaPorte County, Indiana, commanding him to have the body of said Lawrence E. Cook before this Court at a time therein specified, together with the true cause of his detention, to the end that due inquiry may be had in the premises and that this Court summarily proceed to determine the facts and the legality of relator's imprisonment by respondent and then and there discharge relator without day or otherwise dispose of relator as the facts, the law and justice require.

Respectfully submitted,
Lawrence E. Cook,
Relator.

.....
Attorney For Relator.

State of Indiana, }
La Porte County. } ss:

Personally before me, the undersigned officer authorized by law to administer oaths, appeared Lawrence E. Cook, who first being duly sworn, deposes on oath and says he has read the foregoing petition and knows the contents thereof and that the statements made therein are true as he verily believes.

Lawrence E. Cook,
Affiant-Relator.

Subscribed and sworn to this 3 day of September 1948.

(Notarial Seal)

Frank M. Swanson,
Notary Public,
La Porte County,
Indiana.

My commission expires May 24, 1949.

39 Russell W. Marks —tavern business Oct. 1, 1930—was guard at prison—was 21 yrs. old then—Warden Daly was there then—stayed until July 3, 1936.

Told Cook it was against rules—I refused to take the papers. Why—I had conversation with Daly—this was because of Stevenson—

Mr. Grnoschow—Mich. City—Retired

Mrs. Florence Cook—

Cook was out of parole, says no appeal was taken from his conviction.

Fire in 1934 or '35 destroyed old poor house.

Orval George—was inmate in prison at that time—got out in 1936 or '37.

327 U. S. 808 (1946) denied certiorari.

64 N. E. 2nd 25—223 Ind. 694 (1945) *State ex rel Cook* v. *Howard,* Habeas Corpus Appeal.

40 Endorsed: United States District Court * * (Caption—853) * * Amended Petition for Writ of Habeas Corpus.

41 And now the respondent files a motion to dismiss the amended petition for writ of habeas corpus, which motion to dismiss the amended petition reads in the words and figures following, to wit:

42 IN THE DISTRICT COURT OF THE UNITED STATES.

* *(Caption—853) * *

MOTION TO DISMISS AMENDED PETITION FOR WRIT OF HABEAS CORPUS.

Comes now the respondent herein and moves the court to dismiss petitioner's petition for writ of habeas corpus for the following reasons:

1. The petition fails to state a claim against the respondent upon which relief can be granted.

2. The petition does not state facts sufficient to entitle petitioner to the relief requested.

3. The amended petition on its face alleges certain facts which preclude petitioner from his right to the issuance of a writ of habeas corpus. He nowhere alleges that the judgment of the Jennings Circuit Court was void.

4. The petition, in numerical paragraph 11, alleges that on September 4, 1946 Relator petitioned the Indiana Supreme Court for permission to perfect a delayed appeal to said court from said judgment of the Jennings Circuit Court rendered in 1931. That said petition was entitled *Lawrence E. Cook* v. *State of Indiana* original action numbered 28,326; that said order of denial was filed November 27, 1946. It further appears that all of the matters attempted to be raised by Relator in this amended petition have been fully and finally adjudicated by the Supreme Court of the state of Indiana but was by this court in
43 No. 591 Civil, entitled *Lawrence E. Cook* v. *Alfred F. Dowd, Warden* wherein the petition was based on the same suppression and denial set forth herein and this court's action was sustained by the Circuit Court of Appeals in No. 955, which judgment was rendered on March 26, 1946. That by reason of the facts aforesaid appearing on the face of the petition, it affirmatively appears that all of the contentions raised by Relator herein were finally

and fully adjudicated and that the whole matter is now res judicata.

Wherefore, respondent moves that the amended petition be dismissed.

Cleon H. Foust,
Attorney General,
Frank E. Coughlin,
First Deputy Attorney General,
Merl M. Wall,
Deputy Attorney General,
Attorneys for Respondent.

44 Memorandum.

The petitioner, in substance, claims that on July 23, 1931, he was convicted by the Jennings Circuit Court of the crime of murder in the first degree and was sentenced by the Court to the Indiana State Prison for life. He claims that within the six month period after his conviction he prepared the proper papers to take an appeal from this conviction, but that the Warden and other employees of the prison informed him that he would not be allowed to send out the appeal papers. He does not allege in his petition that he has been denied the right to file his appeal with the Indiana Supreme Court since 1933 and, as a matter of fact, at any time from that date until the present time he has had the right to file his appeal with the Supreme Court of Indiana and have that matter determined and we believe that under the circumstances disclosed by his petition he has been guilty of laches in not taking such action and, therefore, has not exhausted his remedes in the state of Indiana.

Nowhere in the petition is it alleged that he was not accorded due process of law in his original trial in the Jennings Circuit Court and the only allegation he sets forth is the fact that from his conviction on July 23, 1931 and through the year 1932 he was prevented by the Warden and employees of the Indiana State Prison from sending out his appeal papers; such allegations are not sufficient to invoke the jurisdiction of this court in a habeas corpus proceeding since the allegation set forth is a matter to be determined upon appeal and not by habeas corpus.

Since the petitioner has not set forth allegations that

he was accorded due process in his trial in the Jennings Circuit Court and since he has not exhausted his remedies by appeal to the Supreme Court of Indiana, the re-
45 spondent submits that the petition is insufficient to invoke the jurisdiction of this court and that the same should be denied and the motion to dismiss should be sustained.

Cleon H. Foust,
Attorney General,
Frank E. Coughlin,
First Deputy Attorney General,
Merl M. Wall,
Deputy Attorney General,
Attorneys for Respondent.

47 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—853) * *

Be it remembered that on the 10th day of May, 1949, the following proceedings were had in the above entitled cause, to wit:

Now here the Court reporter for the Northern District of Indiana, filed in the office of the Clerk of this court, a transcript of the proceedings had in this cause, which transcript of proceedings reads in the words and figures following, to wit:

49 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—853) * *

48 (Filed May 10, 1949. Margaret Long, Clerk.)

Record Of Proceedings And Testimony in the above entitled cause before the Honorable Luther M. Swygert, United States District Judge, at Hammond, Indiana, on the 17th day of February, 1949, at 10 o'clock A. M.

Appearances:

William S. Isham, Esq., Fowler, Indiana, representing the Relator;

Merl M. Wall, Esq., Deputy Attorney General of the State of Indiana,

Charles F. O'Connor, Esq., Deputy Attorney General of the State of Indiana, representing the Respondent.

50 The Court: Are you ready in Cook *vs.* Howard?

Mr. Wall: At this time, your Honor, the respondent wishes to file return and answer. We have already given a copy to Mr. Isham.

Mr. Isham: If your Honor please, we have not had an opportunity to look over these pleadings.

Counsel and I have had a conference and there is a stipulation which we would like to make for the record now with respect to matters of formal proof.

It is stipulated by the parties that the motion for new trial referred to in rhetorical paragraph 5 of the amended petition for writ of habeas corpus and referred to in rhetorical paragraph 4 of respondent's return and answer thereto was filed within the time allowed by law in August, 1931, and that said motion for new trial was denied by the Jennings Circuit Court on October 16, 1931.

Mr. Wall: I suppose at this time, your Honor, we have a technical error in our return and answer. It has been agreed between the parties that our return and answer shall go to the amended petition.

Mr. Isham: That is satisfactory.

The Court: Do you want to interline it?

51 Mr. Wall: I can. We ask permission now to interline the words "To Petitioner's Amended Petition."

The Court: Permission granted.

Mr. Isham: Would the Court care to hear an opening statement?

The Court: I have gone into the facts so many times on motions that I think I know what the story is, unless you want to say something additional.

Mr. Isham: No, your Honor; there is nothing additional. I just wish again to call the Court's attention—

The Court: I have the allegations pretty well in mind.

Mr. Isham: Much of the proof is formal, and if we can hasten it along we would like to do so.

And thereupon the relator, to support and maintain the issues on his behalf, introduced the following evidence:

RUSSELL WALTER MARKS, a witness called on behalf of the relator, having first been duly sworn, testified as follows:

Direct Examination by Mr. Isham.

Q. Will you state your name to the Court, please?

52 A. Russell Walter Marks.

Q. Where do you live, Mr. Marks?

A. Michigan City, Indiana.

Q. Are you married?

A. Yes, sir.

Q. Do you have a family?

A. Yes, sir.

Q. What business are you in?

A. I have been an electrician for the last fifteen years, and I just entered a new business now, in the tavern business.

Q. Tavern business?

A. Yes, sir.

Q. Were you ever employed at the Indiana penitentiary located in Michigan City?

A. Yes, sir.

Q. In what capacity?

A. As a guard.

Q. Are you in any way connected with the institution at this time?

A. No, sir.

Q. When were you first employed there?

A. October 1, 1930, was the first day I started there.

Q. How old were you then?

A. I started October 1st; I was 21. I was 22 my
53 next birthday, would have been 22 my next birthday, in June.

Q. Who was warden in charge of the institution at that time?

A. Warden Daly.

Q. Did he employ you when you were employed, were you employed through him?

A. Yes.

Q. How long did you stay there as a guard?

A. I stayed there until July 3, 1936.

Q. So you were there from October 1, 1930, until July, 1936?

A. That is right.

Q. And your employment was continuous?

A. That is right.

Q. At that time did you voluntarily leave the institution?

A. That is right.

Q. Do you know the relator here, Lawrence Cook?

A. Yes, I met him.

Q. Do you remember about when you first met him, first saw him?

A. Well, it was during 1931, I would say 1931 or 1932; I don't remember just exactly.

Q. When did you first see him, to know him, at least, with respect to when he got up there?

A. Well, I would say the fore part of 1932 or latter part of 1931. You see, I was stationed in what they
54 call "B" cell house, right in front. A lot of new men used to stay in there at that time.

Q. In other words, when you first met him it was shortly after he came there?

A. That is right.

Q. That was some time in the latter part of 1931?

A. That is right.

Q. Now, what were your duties there with respect to "B" house that you talk about?

A. In "B" cell house, they took the total count of the institution and also was in charge of the institution, and then I filled in in what they call the mail room, visiting rooms, took the men out to the farms, and so forth, and so on.

Q. Did you ever have a conversation with Mr. Cook

relating to some papers that he was trying to send out of the institution?

A. Yes, I did.

Q. Can you tell roughly when that was?

A. Well, that was I would say the latter part of 1931 or 1932. Now, like I say, it has been quite a while ago. I really didn't pay any attention to anything like that.

Q. Could you tell the Court just when, approximately, with reference to when he got in there this conversation was?

55 A. Well, I would say sixty to ninety days.

Q. Afterwards?

A. Yes.

Q. Where was this conversation held?

A. It was in one of the dormitories. He asked me if I would take these papers—

Mr. Wall: The question is, where it was.

Mr. Isham: Yes.

By Mr. Isham:

Q. Now, at that time you were in charge of the dormitory in which he was lodged?

A. I wasn't really in charge of it only for that day. We used to rotate, if any man was off, would fill in, something like that.

Q. Now, what was this conversation between you and Mr. Cook?

A. Well, he wanted to file some appeal papers.

Q. Did he say he wanted to?

A. Well, yes.

Q. What did you say to him?

A. I told him it was against the rules of the institution, that we couldn't—in other words, it was against the rules.

Q. Did you see the papers he had in his hand?

A. Well, he had them rolled up. I couldn't tell

56 you how many there was, anything like that, but I refused to take them; like I said, it was against the rules of the institution.

Q. Now, when you first started to work there, did you have any conversation pertaining to instructions as to your duties with Warden Daly?

A. Well, the Warden generally took you into his office—

Mr. Wall: I move that the answer be stricken as not responsive to the question.

By Mr. Isham:

Q. The question is—did he take you into his office?

A. Yes.

Q. Did you have a conversation with him relating to what your duties there were?

A. Yes.

Q. Did he tell you anything pertaining to the rules that you could not do and could do?

A. That is right.

Q. What, if anything, did he tell you in respect to permitting papers prepared in the prison, legal papers, prepared in the prison, being sent out?

A. It was absolutely against the rules of the institution.

Q. When you told Cook some sixty or ninety days after he got there in 1931 that he could not send out the
57 papers, did he ask you to send them?

A. That is right.

Q. You were referring to the rule that Warden Daly had told you about when you started to work there?

A. That is right.

Q. Now, how long did Mr. Daly remain the warden of this institution, do you know?

A. I couldn't give you the exact date. I think he left in the spring or early summer of 1933.

Q. 1933?

A. Yes, sir.

Q. At any time during his stay in office was there ever any change in the rule prohibiting prisoners who had no attorney from preparing papers in the prison and sending them out?

A. To my knowledge, there was no change.

Q. If there was, you were never notified of it?

A. That is right.

Mr. Isham: I believe you may cross-examine.

Cross-Examination by Mr. Wall.

Q. Where are you located in the tavern business?

A. 517 Franklin Street, Michigan City, Indiana.

58 Q. Have you talked to Mr. Cook in the last year or two?

A. I haven't seen him other than today.

Q. What about the policy, what in fact did the prison officials do during that time about permitting these papers to go out?

A. Well—

Mr. Wall: We object, unless he knows of his own knowledge.

The Court: I suppose he would not answer if he didn't know. Go ahead.

A. I know that people came to me and told me they tried to get papers taken out.

Mr. Wall: We move to strike the answer out, as not responsive.

The Court: That would be hearsay. Motion sus-
87 tained.

By Mr. Isham:

Q. Now, you were working there doing these various jobs all this period of time?

A. Yes, sir.

Q. Did you learn of the existence of a policy of the institution during the time Mr. Daly was Warden prohibiting prisoners from preparing and sending legal papers out of the institution?

You can answer yes or no.

A. Yes.

Q. What was that policy?

A. Well, the policy, Mr. Cook told me he tried to get papers out; they wouldn't let them go out.

Mr. Wall: We move to strike the answer out.

The Court: Sustained.

By Mr. Isham:

Q. Did they let papers, appeal papers, for any prisoners go out?

A. Not that I know of.

Q. Was it the policy of the institution at that time not to let them out?

A. Yes, it was at the time.

Q. Now, then, did you have a conversation with Mr.
88 Cook yourself relative to his case?

A. Well, he came to my shop there one day. I said to him, "Have you ever had your case up for to be reheard at Indianapolis?"

He said, "No, but I made out some papers." He said, "They wouldn't let them go out."

I said, "Did you go through the right way, getting your papers out?"

He said, "I have tried everything. I went to all of them. My papers are still here. They have not gone out. They would not let them go out."

That is as much as I know.

Q. It was from that story and other stories like that you acquired your knowledge of the policy of the instruction?

A. Yes.

Q. Do you know about what time that was that you had this conversation with Mr. Cook?

A. I can't just recall what time, or what date, it was. It was shortly after he prepared those papers he wanted to send out that I spoke to him.

Q. When was it with reference to the time he first came there, do you know, or do you know when he first came there?

A. I think he came there in 1931.

89 Q. How much later was it he talked to you, was it a short time or long time?

A. Oh, probably six months after that or better; I can't just recall when it was.

Mr. Isham: I believe you may cross-examine.

Cross-Examination by Mr. O'Connor.

Q. Were you ever called into the Warden's office to discuss the policy of the prison in regard to sending out legal papers?

A. No, sir; I was not.

Q. You never saw a bulletin or any rule posted concerning sending out legal papers?

A. No, sir.

Q. So the only way you answered Mr. Isham's question that the policy of the prison was not to send out legal papers was based on what somebody else had told you?

A. What Mr. Cook told me.

Q. Did any prison official discuss this policy with you?

A. With me?

Q. Yes.

A. No, sir.

Q. All you know about this matter of sending out

90 legal papers is what you learned from Mr. Cook?

A. I knew the talk around there from different

prisoners was—I can't recall their names—that they had prepared papers and they wouldn't let them go out.

Q. Just from Mr. Cook and various rumors you heard?

A. Yes.

Mr. O'Connor: The respondent moves that Mr. Ganshaw's testimony concerning the sending out of legal papers be stricken, on the ground it is not based on his personal knowledge, but based on rumor and what somebody told him.

The Court: Well, it probably has some aspects of hearsay, if that were the only thing that were offered, but as a matter of corroborating other testimony, and for that reason only, I am going to overrule the motion. I think its character is such it may go to the weight.

Mr. O'Connor: That is all.

Mr. Isham: I have no further questions.

(And thereupon the witness was excused.)

91 FLORENCE COOK, a witness called on behalf of the petitioner, having first been duly sworn, testified as follows:

Direct Examination by Mr. Isham.

Q. Will you state your name, please?

A. Mrs. Florence Cook.

Q. You are the sister of Lawrence Cook?

A. Yes, sir.

Q. Your name was Cook, and you married a man by the name of Cook, so your name is still Cook?

A. Yes, sir.

Q. Where do you live?

A. Auburn, Indiana.

Q. What does your husband do?

A. He is in the trucking business.

Q. How long ago were you married?

A. It will be five years in June.

Q. How old are you?

A. Thirty-six.

Q. Mrs. Cook, you remember when your brother was tried for murder in Jennings County?

A. Yes, sir.

Q. Did you attend the trial?

92 A. I did.

Q. You remember that he was convicted by a jury and sentenced to prison?

A. Yes, sir.

Q. When, with reference to the return of the verdict, was your brother taken to Michigan City?

A. The next day.

Q. Do you know what that date was?

A. That he was taken?

Q. Yes.

A. July 24, 1931.

Q. That was before any motion for new trial was filed in the case; is that right?

A. Yes, sir.

Q. Now, from then on, did he ever get out of prison except for casual attendance in some court hearing or at the hospital?

A. No. I think he was taken once down to Indianapolis for a lie detector test.

Q. Now, did you receive a communication from your brother some time after he had been up there relative to your going up to see him about something?

A. Yes, I did.

Q. That was a letter?

93 A. It was a letter from my brother.

Q. Now, what did that letter say in respect to what he wanted you to do?

A. Well, he said he had prepared some appeal papers, and asking for the transcript and for appointment of an attorney, and would I come up and get them.

Mr. Wall: If you can produce the letter, it would be the best evidence.

Mr. Isham: We can't produce any such letter.

By Mr. Isham:

Q. Do you have the letter?

A. No, I don't have the letter.

Q. Did you, in response to the letter, go up to Michigan City?

A. I did.

Q. How old were you at that time?

A. Well, I guess I was about nineteen.

Q. About eighteen, weren't you?

A. I was born in 1912; this was in 1931, so nineteen is what I was.

Q. When you got to Michigan City, what did you do?

A. Well, I went to the prison and asked to see my brother. They said it was too late. I said I wanted to see the Warden, they were supposed to have some papers for me; I was supposed to get some papers from my
94 brother. I went to the Warden's office, talked to him about it.

He said, "Well, I just can't let any papers go out of here."

I said, "But we have to have the papers in order to get an appeal and have an attorney."

He said, "I am sorry; it is just against the rules," and dismissed me. And that was all.

Q. Had you ever been to the prison before that time?

A. No.

Q. That was your first visit?

A. Yes.

Q. Did you get to see your brother at all on that occasion, that trip?

A. No, I didn't.

Q. Do you know, of your own knowledge, whether or not your brother prepared these papers, or was it done at least with the aid of somebody?

A. I am sure someone helped him, because he didn't know anything about anything like that.

Q. How old was he?

A. He is two years older than I am, so he must have been twenty-one.

Q. Then what did you do?

A. Well, I went back home, back to Cincinnati,
95 Ohio. I thought that was just all of it; he could not prepare the papers, we couldn't have any attorney, and there was nothing I can do about it.

Q. At that time you had some younger brothers and sisters?

A. Yes; I had a brother—I have a brother four years younger than myself, and a sister ten years younger than myself.

Q. So that they were fifteen and eleven?

A. That is right.

Q. Fifteen and nine.

Your mother was unmarried at that time?

A. Yes.

Mr. Wall: I believe I will object to this line of questioning. It is not germane, so far as I know.

Mr. Isham: I was just getting ready to prove they were poverty-stricken and had no money at that time.

The Court: Go ahead.

By Mr. Isham:

Q. Did you or your mother, or your younger brother and sister, have any property or money at that time available to employ attorneys, to pay for a transcript, and to take an appeal in the case?

96 A. No, we did not.

Q. When did you see your brother, when did you next go to Michigan City?

A. Around a year, I think it was.

Q. That was the only occasion you ever talked to Warden Daly?

A. I believe it is the only time I talked to him.

Q. It was Warden Daly?

A. It was Warden Daly, definitely.

Mr. Isham: You may cross-examine.

Cross-Examination by Mr. Wall.

Q. You knew Warden Daly personally?

A. I asked for him; I said, "Warden Daly?" He said, "Yes, ma'am."

Q. Where did you see him?

A. In his office.

Q. Where was his office?

A. Well, it was—I don't know whether it was to the left, or just where; it was in an office.

Q. There were other men there, weren't there?

A. You mean in the office?

Q. Yes.

A. Well, I went by some guards, but I just recall seeing him.

97 Q. You know Mr. Swanson at the prison?

A. Yes, I know him.

Q. He was in the next room, with the door open?

A. To tell the truth, I don't know who was there. It was the first time I had been there. I was pretty young and pretty nervous, too.

Q. So you are sure Warden Daly said he was sorry, that was against the rule?

A. That is what he said.

Q. You heard from your brother after Mr. Kunkle went in, in 1933?

A. He wrote me always about twice a month.
Q. Even under Mr. Daly's regime?
A. He wrote often; I think the first, first or second Sundays.
Q. Didn't he write to inform you, after Mr. Kunkle became Warden, that he was then permitted to prepare and file papers?
A. He wrote, told me he could prepare papers. Then we later started. That is when we started.
Q. Back in 1933?
A. In 1933. He started preparing the evidence.
Q. You did not file anything in court, to your knowledge, for his benefit?
A. In 1937 we filed a petition for error coram nobis.
98 Some of those affidavits were signed in 1934.
Q. Do you know why he did not file this petition prior to 1937?
A. We did not have all of the affidavits signed. There were various things we wanted to get, put it all together.
Q. Did you have an attorney for the filing of this petition for error coram nobis?
A. When it was filed, an attorney represented him. I got an attorney.
Q. It took you about four years to get those things ready?
A. Yes. The way we did it, he prepared affidavits as to what we thought the witnesses could sign to. Then I would take them to them. If they could not sign them as they were, then we would draft them as to how they said it was, and then when we got them all together, we filed them. I had an attorney represent him.
Q. Who was the attorney?
A. Well, Charles Rice was the attorney first. He was quite elderly. We had a continuance or so and before we actually got to a hearing and a decision it, why, he died. And then we had Royal Turner, of Greensburg, come in on it, and then he died. And then we had Louis Ewbank, of Indianapolis.
Q. How long before 1937 had you hired the first of these attorneys?
99 A. I didn't hire one until we filed the petition. That was in 1937.
Q. It took you or your brother all those four years to get the petition ready?
A. Yes.

Q. And the affidavits of people who lived around in the state?

A. I was in Cincinnati; I was working. And some of the witnesses lived in Norwood, Ohio, which adjoins Cincinnati there, and some lived in Indiana.

Q. Some of them were in the prison, weren't they, some of the people who signed?

A. Yes, there was one witness in the prison; that is right.

Q. With reference to those people in Norwood, did it take you four years to get their affidavits?

A. No, it didn't take me four years. In fact, some of those were signed in 1934.

Q. What caused the delay until 1937?

A. Well, we just didn't get them all together, was all; that is the only reason I know.

Q. Did Warden Daly show you the rule?

A. No, he didn't show me any rule.

Q. That was the only time you talked to him?

A. That was the only time I talked to him.

100 Q. You did not attempt to see anyone else, at Indianapolis or anywhere, concerning that attitude?

A. No, sir, I did not.

Q. You are the sister of the petitioner, of course?

A. Yes, I am.

Q. You have been working on this case to secure his release for years, ever since you first went up to see him and see the Warden?

A. Yes, I have.

Q. Naturally, you want to help him on the case?

A. I sure do.

Mr. Wall: That is all.

Redirect Examination by Mr. Isham.

Q. To refresh your memory, wasn't one of the reasons you had a four-year delay in getting a writ of error coram nobis the fact you also had to raise some money to pay a lawyer?

A. Yes; that is one of the reasons.

Q. Now, you are interested very much in your brother?

A. Yes, I am.

Q. Is there anything you have testified to under oath that is not true, based upon the fact you want to see

101 your brother released?

A. No, sir.
Q. You have told the truth, as you see it?
A. I have.
Mr. Isham: That is all.

Recross Examination by Mr. Wall.

Q. In this talk with Mr. Daly when he said it was against the rule, I want to get this clear, did you ask him to take the papers out for your brother yourself?

A. Well, from the letter I had received from my brother, he said he had the papers ready and I should come up and get them.

Q. All right. You told Warden Daly about that?

A. That I had the letter, yes.

Q. Didn't you understand when the Warden told you what you say he did that he was referring to the fact you could not take them out of the prison, but they had to come to his office and be examined first?

A. What I intended to do, I thought he could hand them over off his desk to me. That was the way I thought I would be able to get the papers.

Q. Did you know at that time that they would have 102 to be examined by the Warden?

A. I supposed they would, yes; probably so.

Q. So you understood they could not permit any of them to be sent out in any way?

A. It was my understanding—he said it was against the rules for any papers prepared in here to be taken out or sent out.

Mr. Wall: That is all.

By the Court: Q. Let me ask you, Mrs. Cook, Mr. Fitzgerald was one of the attorneys at your brother's trial; who was the other lawyer?

The Witness: Clem Huggins, Louisville, Kentucky.

By the Court: Did you talk to them about your experience?

The Witness: No, I didn't, not up there. They had stopped on the case after the trial and after they filed the motion for new trial and it was overruled they didn't do any more. I didn't talk to them because I didn't have any money to pay them. I didn't feel they would have anything to do with any part of it.

By the Court: Q. Well, did you or any member of

your family, other than your brother, talk to Mr. Fitzgerald or Mr. Huggins?

103 The Witness: About what?

By the Court: Q. About your brother's case, after they had filed the motion for new trial.

The Witness: Well, he wrote a letter or two to us.

By the Court: Q. Who?

The Witness: Mr. Fitzgerald, but it was not concerning the case. My mother wrote once and said something about the trial, and he wrote back and said we had had a trial. And mainly what they were talking about was the fact we put a mortgage on a piece of property and we hadn't paid the mortgage off.

By the Court: Q. But you did not discuss with Mr. Fitzgerald or Mr. Huggins anything about your brother's case, as such, or an appeal in reference to it?

The Witness: A. Well, he gave us—before my brother was taken to Michigan City he said that—

By the Court: Q. Who said?

The Witness: I don't know whether it was Mr. Huggins or Mr. Fitzgerald; I couldn't say. It probably was Mr. Huggins. He had, it seemed like, more say so than Fitzgerald did. We were there at the jail and he said they

104 would file a motion for new trial, and if it were overruled, then, if they appealed it, they would have to have some money. We were strapped, as it was.

I never did have any discussions with him about my going up there to get the papers. The way we felt about it, well, there wasn't anything they could do about it. Warden Daly gave me to understand very strictly it was his rule and there wasn't anyone else telling him what to do.

The Court: That is all.

Any more questions?

Recross Examination by Mr. Wall.

Q. As I understand you, neither you nor your brother, to your knowledge, asked either Mr. Fitzgerald or Mr. Huggins to take an appeal for him?

A. Oh, yes, we did; that is, we talked before the motion for new trial was filed. Mr. Huggins said they would file a motion for new trial.

Q. I am talking about after the motion for new trial was overruled and about taking an appeal.

A. Well, no, I can't say we did, in just those words, because we didn't have the money to pay him.

Q. Then you can't say Mr. Huggins or Mr. Fitz-
105 gerald refused to carry on an appeal for your brother, can you?

A. Well, of course, they said—the day they took my brother away they said if the case had to be appealed they would have to have more money, so that was telling us—I mean that was putting it all right there, that they would have to have more money if they appealed it.

Q. So you did not say anything further to them about an appeal?

A. My mother wrote something about the trial, wanting another trial, and he wrote back and said, "You have had a trial."

Q. Your mother did not say anything about wanting them to take an appeal?

A. She talked about wanting to get a new trial.

Mr. Wall: That is all.

Redirect Examination by Mr. Isham.

Q. At the time that you are referring to, before the motion for new trial was ruled on, when you talked to Mr. Huggins and Mr. Fitzgerald at the jail, had you paid either one of them for defending this case?

A. Well, no. We had given them a mortgage for $1450,
and the way it was, we gave a note for $500, and then,
106 if he was indicted by the grand jury, there was to be another thousand dollars additional, payable at once, and when it came time and he was indicted, well, we didn't have the money, so we gave them a note for $1450 and a mortgage on a piece of property, on a small farm that was in my mother's name.

Q. The piece of property was the house in which you lived?

A. That is right.

Q. After the trial, that was not paid?

A. No; in fact, they foreclosed and took the property.

Q. I mean, at the time of this conversation you owed them for work?

A. For the work they had already done, so you know how they would feel about it.

Mr. Wall: We move to strike the latter part of the answer.

The Court: It is stricken.
Mr. Isham: That is all.
(And thereupon the witness was excused.)
The Court: We will adjourn until one thirty, or can you be back at one fifteen?
Mr. Wall: That is all right.

(And thereupon a recess was taken until one fifteen
107 o'clock in the afternoon.)

And at one fifteen o'clock in the afternoon on said day, Thursday, February 17, 1949, the trial of said cause was resumed, pursuant to adjournment.

Present:

The same as before.

The Court: Are you ready to proceed?
Mr. Isham: Yes, your Honor.

LAWRENCE E. COOK, petitioner in said cause of action, and a witness in his own behalf, having first been duly sworn, testified as follows:

Direct Examination by Mr. Isham.

Q. Will you state your name, please?
A. Lawrence Cook.
Q. You are the Lawrence E. Cook who is the petitioner in this proceedings?
A. Yes, sir.
Q. How old are you?
A. I am thirty-nine.
Q. You were convicted of the offense of murder in the Jennings Circuit Court in the year 1931, were you not?
A. Yes, sir.
108 Q. Immediately after your conviction, where were you taken?
A. To the Indiana State Prison.
Q. Do you remember the date you were taken up there?
A. The 24th of July, 1931.
Q. You have remained ever since under the custody of the various wardens in the institution?
A. Yes, sir.

Q. Who is the present warden of that institution?
A. Ralph Howard.
Q. You are now under his custody and control?
A. Yes, sir.
Q. How old were you when you first went to the prison?
A. 21 years old.
Q. After you got there, or when you got there, I will ask you to state if your motion for new trial had been filed.
A. No; no, it had not.
Q. It was later filed, however, was it not?
A. Yes, sir.
Q. And denied, as you were informed?
A. Yes, sir.
Q. I will ask you to state if you did anything while in prison in an effort to obtain a review of your conviction in the higher courts of Indiana?
A. Yes, I did.
109 Q. Now, will you tell the Court, as near as you can, when you started whatever efforts you did start to obtain an appeal of this case.
A. The first knowledge that I had of the ruling on the motion for new trial was contained in the newspaper. Then I began asking—that was along in October, I think, if I remember correctly.
Q. Of 1931?
A. Of 1931. And I had made some inquiry of other prisoners as to what steps should be taken, if the motion for new trial was overruled.
Q. Let me interrupt you there, Mr. Cook. You may state whether or not it is a fact that there are now, and were then, various inmates of the institution up there who had some knowledge of the law?
A. Yes; that is right.
Q. Now, was it to those people, as you found them on you talked, were you directed to who would be the lawyer, and so forth, up in prison?
A. Yes, sir.
Q. And they were all inmates?
A. Yes, sir.
Q. And they did advise you?
A. Yes, they did.
110 Q. What did they advise you?
A. Well, they told me if the motion for new trial was overruled, that I could then appeal; I had six months

within which to appeal, and something was said about whether or not I had an attorney, and whether or not I could get one, and there was considerable doubt in my mind as to whether I could, or could not.

Q. Again, let me interrupt you. At that time were you wholly without funds, without any money?

A. Yes; that is right, I was.

Q. Did you have any present means of getting any money?

A. No, I did not.

Q. Do you know of the financial condition of your mother and sisters and brothers at that time?

A. Yes, I do.

Q. Was that such that they could procure any funds for the purpose of obtaining a record in the case and an attorney to take the appeal?

A. No, they could not.

Q. You were at that time, in fact, what is referred to in the law as a pauper?

A. Yes, sir.

Q. Before we go any further, let me ask you this: Since you have been up there, these same seventeen 111 and a half years, have you studied some law?

A. Yes, I have.

Q. You have read current decisions, advance sheets?

A. Yes, sir.

Q. Text books?

A. Yes, sir.

Q. Are those books available in the prison library?

A. No, they are not.

Q. You have to subscribe to those personally?

A. Yes, sir.

Q. Now, after you had been advised about this appeal business, and that you had six months within which to take the appeal from the overruling of the motion for new trial, what then were you advised, and what did you do?

A. Well, I was told it would be a good idea to prepare a transcript, even a memory transcript; that it would probably be beneficial to counsel, if I could get counsel. So one of the first things I did was to write out from memory everything that happened in the case, even going back to some time in 1927, when I first met my wife, and so I did that up until the time of the writing, which was, as I recall—it must have been in December of 1931, or January of 1932, I wrote this all out, and I got paper from what

ever source I could get it, and I made a memory transcript.

I showed this memory transcript to one or two prison-
112 ers there, and so they told me that they thought I might be able to get the case reversed.

So then I prepared a petition for the appointment of counsel, an attorney.

Q. You say you prepared it. That was done under the advice and guidance of some of these men in the prison?

A. Well, yes.

Q. They told you what to put in?

A. They told me what to put in.

Q. You were not skilled in the law at that time?

A. No, I was not.

Mr. Wall: I object to the question.

The Court: It is pretty leading, but go ahead.

A. (continuing) And they told me that I might prepare a motion for the appointment of an attorney and send it to the clerk of the trial court, and so I prepared this and asked for the appointment of counsel and, if that be given, a transcript made up by the court officials, and we also included an assignment of errors, what we thought would be a proper assignment of errors, and, let's see, I believe we asked for—made out a praecipe for this transcript.

And those papers I talked to Mr. Marks about. The fact of it is, I had seen Mr. Marks when I first came into prison. He was in charge of a cell house at the place
113 we had at that time, and he said he had read something in the newspaper about the case, and asked me what I was going to do about it. I told him that I was going to file a motion for new trial, and then, if that was overruled, why, I was going to try to appeal, so something was said about whether or not I had counsel to do so, and I told him no, that I didn't know whether I would be able to get counsel, or not; that if I didn't, why, I would try to do it myself, and try to get someone to help me, if I could. And he said, "Well, you can't send those papers out of the prison."

I asked him why, and he said, "Well, it is against the rule," and he said, "You will have to have an attorney."

So I let that go until after I had the papers prepared, and then I saw him again, and I asked him if he would take these papers to the Warden, and he said, no, that he wouldn't do that because there was a rule against it.

So, as the result, why, I couldn't send the papers out, and I kept the papers for some time.

It was the practice at that time to search the cells very closely, and sometimes those sort of papers would be confiscated and destroyed, and I didn't want to lose these, so I became acquainted with a fellow who was a clerk in the receiving department—

Q. Was he a prisoner?

114 A. Yes, sir, he was a prisoner, but I learned that he very seldom lost anything; that his quarters were not searched. So I asked him if he would keep them, and he said, yes, he would keep them, so I left them with him. And some time later this building where he said he had the papers was destroyed by fire; it was practically destroyed, totally destroyed, and those papers, so far as I know, were burned up at that time. However, I had this memory transcript in another place, and I still have it.

Q. Do you have it with you?

A. Yes, I do.

Q. Do you have it on your person?

A. No, I have it laying on the table right underneath there (indicating).

Q. I hand you a great many sheets of paper, with penciled writing on them, and ask you to state if that is the transcript to which you are referring?

A. Yes, sir, it is.

Q. Now, will you again tell the Court approximately at what time you commenced and ended that transcript?

A. I started this the latter part of December; I recall that I was working on it at Christmas time, and it evidently was finished up some time in January, of 1932.

Q. As you wrote that, did you keep it concealed?

A. Yes, I did.

115 Mr. Isham: Your Honor, I would like to exhibit this bunch of papers to the Court and counsel, without offering them in evidence.

The Court: If you just want me to look at the bunch of papers, that is one thing, but if I have to read them, I think they should be in evidence.

Mr. Isham: The content of the papers is not germane, as I see it, just the fact that this constitutes an effort to prepare the transcript about which he has testified. That is the only purpose. I don't believe it is properly admissible in this case.

Mr. Wall: I don't think it is competent. He has testified he made a transcript.

Mr. Isham: I am physically exhibiting it, is all. May the record show that the memory transcript about which the witness testified has been exhibited to the Court, but not offered in evidence?

Mr. Wall: Yes; that is all right.

Mr. Isham: Thank you.

By Mr. Isham:

Q. Now, after you had talked with Mr. Marks about the possibility of sending out these papers, the peti-
116 tion for appointment of an attorney addressed to the Jennings Circuit Court, the petition—I guess it was all in the same petition—relating to the procurement of the transcript of evidence in your case, the praecipe for transcript, and assignment of errors, did you talk to anyone else at the prison other than inmates about getting the papers out?

A. Yes, I talked to Warden Daly.

Q. Will you tell us the circumstances, when and how you talked to Warden Daly about getting these papers sent to where you wanted them to go?

A. Well, it was the custom for the Warden to come in the hospital possibly once a week, and I learned of that custom, so I went to the hospital for about a week each morning and stood in line, and when I went by the drug dispensing window I would ask for some aspirin tablets, and after about a week, why, he came in one morning, and I had the papers with me at that time, and I stepped out of line and asked him if he would send these papers to the court for me, and he said, "No, that is not allowed." He said, "It is against the rule."

And I said I was trying to get an appeal, I had to send them out, and he said, "It is against the rule," and walked around me and on down the hallway.

Q. Now, was there anybody else you ever talked
117 to there about the appeal papers?

A. Well, I talked to Mr. Ganshaw.

Q. He is the gentleman who testified here this morning?

A. Yes, sir. And then I talked to the Deputy Warden.

Q. Who was he?

A. He was a man by the name of Mr. Claudy.

Q. When was it you talked to Mr. Claudy?

A. Well, I talked to Mr. Claudy as he walked from the dining room toward his office. That was before I had talked to Mr. Daly. And I asked him if I could send the papers to court, and he said, no, there was a rule against it.

Q. You heard Mr. Ganshaw testify this morning about your conversation with him?

A. Yes, sir.

Q. Relating to these appeal papers?

A. Yes, sir.

Q. Was that substantially correct, as you remember it?

A. Yes, it was.

Q. Now, after all of these efforts, did you make any further efforts to get these papers out?

A. Well, no, I can't say that I did. I felt that I was stymied. I knew of no other way to get them out.

Q. Did you write your sister about coming up?

A. Yes, I did do that.

118 Q. Of your own knowledge, you don't know whether she came up; is that right?

A. No, I don't actually know; I actually don't know.

Q. Did you ever try to make an appointment with the Warden in the usual channels to discuss this matter, Mr. Cook?

A. Well, I sent a request out there.

Q. What, if any, action was taken on that?

A. Well, I never heard anything from it.

Q. Now, in addition to the facts relating to this policy of the prison, I will ask you to state if you talked with other inmates up there on numerous occasions and they told you what the policy of the prison was, also.

A. Yes, I did.

Q. What did they tell you?

A. They told me I could not send the papers out.

Q. Did you ever hear of any other rule to the contrary during the tenure of Mr. Daly as Warden of the prison?

A. No, I never did.

Q. Did you attend the meeting Mr. Kunkle had when he came to be Warden, in June, 1933?

A. Well, I actually don't recall it. I evidently did not, because I don't have any recollection of it.

Q. Did you hear anything about it after the meeting was over?

A. No; I can't recall that I did.

119 Q. Was there ever an appeal taken in your case?
A. No.
Q. From your conviction?
A. No, sir.
Q. How long have you been there?
A. I have been there seventeen and one-half years.
Q. Mr. Cook, there is an allegation in this petition to the effect you are not guilty of the crime of which you were convicted. I am going to ask you that question point-blank. Are you guilty of the crime of which you were convicted and for which you are now serving a sentence?
A. No.
Mr. Isham: You may cross-examine.

Cross-Examination by Mr. Wall.

Q. You know Mr. Daly is now dead?
A. I have heard that, yes.
Q. You heard it some years ago?
A. Yes; I think it has been at least two or three years since.
Q. What you are telling the Court is the truth about your conversation with Daly?
A. Yes, sir.
120 Q. I believe you said after Mr. Kunkle became Warden you never did hear, to your knowledge, of this change of rule?
A. No, I did not; I don't recall hearing it.
Q. Did you make an effort, after Mr. Kunkle became Warden, to send out those appeal papers again?
A. No, I didn't.
Q. Do you mean to tell the Court that you thought all during his administration the same rule was in effect?
A. No, that wasn't the reason I didn't try.
Q. Can you tell the Court why you did not try after the change of administration?
A. Well, I was informed that I had six months within which to perfect my appeal, and the six months had went by, and I felt I had lost my appeal; there was nothing that could be done about it.
Q. Were you informed later you could take a delayed appeal, or appeal after the time expired?
A. Not until the Indiana Supreme Court ruled on my habeas corpus petition.

Q. Was that the first time you learned of that?
A. That was the first time.
Q. And you did take an appeal to the Indiana Supreme Court from that habeas corpus decision?
A. Yes.

Q. And the judgment of the lower court denying
121 your writ was affirmed by the higher court?

A. Yes.
Q. I believe you said, among other things, there was no appeal taken from your conviction of the crime of murder in the court below?
A. Yes.
Q. I will ask you again, are you sure about that?
A. Well, I mean by that that there was no appeal taken from the original judgment of conviction.
Q. Didn't you file a petition to appeal with the Supreme Court of Indiana within the last two years setting forth the fact you had been prevented from sending out your appeal papers?
A. Yes, sir, I did.
Q. And didn't you file affidavits, and counter affidavits were filed by the State, in that connection?
A. Yes, there was.
Q. And the judgment of the Supreme Court was against you on that, wasn't it?
A. Yes, it was.
Q. Didn't you then take the matter up by certiorari to the United States Supreme Court?
A. Yes, sir, I did.

Mr. Wall: Mark this Respondent's Exhibit 1.

122 (For the purpose of identification, said instrument was marked Respondent's Exhibit 1.)

By Mr. Wall:

Q. I just want you to look at what is entitled "Transcript of Record," marked for identification as Respondent's Exhibit 1. Is that what you had prepared in order to petition the Supreme Court of the United States for writ of certiorari?
A. It appears to be that; I believe it is; I believe it is, from looking at it.
Q. I want you to state if that was generally, if you know, a copy of your proceedings.
A. Yes, I believe it is.

Q. And you had some attorneys from Lafayette at that time prepare that for you, I believe, didn't you?

A. Yes, Mr.—

Q. Lasher & Simmons?

A. Lasher.

Q. The Supreme Court of the United States denied your petition for writ of certiorari?

A. Yes, sir.

Q. Do you recall offhand whether or not in your petition for appeal to the Supreme Court of the State of Indiana you mentioned and set forth the fact you were
123 prevented from filing your appeal papers by the officials of the prison?

A. Which appeal are you speaking of?

Q. The first appeal you have been telling us about, where Warden Daly refused to permit you to send any papers out.

A. I don't quite understand you.

Mr. Wall: I will withdraw the question and ask it over again.

By Mr. Wall:

Q. In this petition you filed before the Supreme Court of the State of Indiana for permission to appeal—

A. Yes.

Q. —do you remember that you set forth as one of the causes why the Supreme Court should consider it the fact you were prevented from making your appeal within the proper time set out by law?

A. Oh, yes.

Q. You fully set that forth, to the best of your ability, in that petition?

A. Yes.

Q. Isn't it true after the Supreme Court of the State of Indiana, in an opinion by Judge Gilkison, denied your petition, that you filed a petition for rehearing in that same court?

A. Yes.

124 Q. And in that petition for rehearing do you remember you stressed the fact particularly one of your chief reasons for filing with the Court, and asking for permission to file, was the fact you had been prevented by Warden Daly in the years 1931 and 1932, and for some time thereafter, from sending out your papers?

A. That's right.

Q. That was presented in your petition for rehearing, also, wasn't it?

A. Yes.

Q. And the Supreme Court also denied that petition, that is, the Supreme Court of Indiana?

A. Yes.

Q. Now, this last petition that you prepared in the case I have been talking about, the last one before the Supreme Court of the State of Indiana, did you assist your attorney, Mr. Lasher, in preparing it?

A. Yes.

Mr. Wall: I believe that is all, if the Court has no questions.

By the Court: Q. You say that these appeal papers were destroyed?

The Witness: The petition for the appointment of counsel and the transcript and the assignment of er-
125 rors and the praecipe for transcript were destroyed by this fire, as I understand it.

By the Court: Q. When was that?

The Witness: That fire occurred, I think it was in 1934 or 1935. I am inclined to think it was around 1934.

By the Court: Q. In what building was the fire?

The Witness: It was in the Receiving Department, they called it.

By the Court: Q. In what building?

The Witness: Well, it was the Receiving Department Building. It had originally been the old Power House, and they built a new Power House, and moved the old Power House out, even though there was still a fan, a large fan, in this building. The rest of it was converted into a bath house and a receiving department where they dispensed clothes and gave the men baths.

By the Court: Q. This other inmate lived there, or stayed there?

The Witness: Yes, sir.

By the Court: Q. Did he have a cell there?

The Witness: No, he didn't have a cell, but he was the clerk in charge of that building. He was an in-
126 mate.

By the Court: Q. Did he work there during the day and go to his own cell at night?

The Witness: Yes, sir, he did.

By the Court: Q. Where did he keep these papers?
The Witness: In his desk.
By the Court: Q. Did he have a desk?
The Witness: Yes.
By the Court: Q. What is his name?
The Witness: His name was Orville George.
By the Court: Q. Where is he now?
The Witness: The last account I had of him, he was in Michigan.
By the Court: Q. What was he in there for?
The Witness: I actually don't know.
By the Court: Q. Had he been in there before you got there?
The Witness: Yes; he was there before I got there.
By the Court: Q. How long did he stay in the Indiana State Prison?
The Witness: Oh, he stayed there quite a while. I don't know just how long.
By the Court: Q. With reference to the year, do you remember what year it was he got out?
127 The Witness: He must have got out—well, he must have got out about 1936 or 1937, I think.
By the Court: Q. How old a man was he at that time?
The Witness: Oh, he was about forty years old.
By the Court: Q. Orville?
The Witness: Yes.
By the Court: Q. What was his middle initial?
The Witness: I don't know.
By the Court: Q. George?
The Witness: Yes.
By the Court: Q. You handed all these papers you enumerated to him?
The Witness: Except the memory transcript.
By the Court: Q. How do you know they were destroyed?
The Witness: Well, I only have his word for it, is all.
By the Court: Q. He told you?
The Witness: Yes.
By the Court: Q. Did you see the fire?
The Witness: Yes, I saw the fire.
By the Court: Q. What kind of fire was it, did it destroy the building?
128 The Witness: Yes, it totally destroyed the building. They brought in fire apparatus from Michigan

City. It was totally destroyed and later torn down, and there is a new building built on the site.

By the Court: Q. Did you know those papers were in there before the fire, did you know where he was keeping them?

The Witness: Well, he told me where he kept them. I didn't see them in the desk.

By the Court: Q. When did you give them to him, about what time?

The Witness: I gave them to him—I had them in my cell for a while, a short time, and then I gave them to him; I suppose about some time in 1932.

By the Court: Q. And this fire occurred in 1934 or 1935?

The Witness: Yes.

By the Court: Q. Why did you give him the appeal papers but not the transcript?

The Witness: Well, I didn't want to have them all in one place; if some of them got lost, I wouldn't lose all of them.

By the Court: Q. The memory transcript was, in
129 some respects, more important to keep than the appeal papers, wasn't it?

The Witness: Yes, that is right.

By the Court: Q. If you were fearful they would confiscate, the officials would confiscate the papers they found in your cell, why wouldn't you give him the transcript, if you were going to give anything to him, or give him all of the papers?

The Witness: Well, the fact of it is I had the memory transcript hid; I didn't have it in my cell.

By the Court: Q. You mean some prisoner had it?

The Witness: No; no, I had it hid in another place.

By the Court: Q. Who helped you prepare these papers?

The Witness: Well, there was a prisoner by the name of John Goodman that helped me some.

By the Court: Q. Where is he?

The Witness: I understand he is in Illinois.

By the Court: Q. Who else?

The Witness: There was a fellow who was a former mayor of Columbia City, Indiana, a fellow by the name
130 of Crouch, Lloyd Crouch. He gave me some information.

By the Court: Q. Were Goodman and Crouch lawyers?

The Witness: Well, my understanding was Crouch had at one time been a lawyer, yes.

By the Court: Q. Who else? Goodman, Crouch, and who else?

The Witness: Well, there is a fellow in there from Muncie, Harry Stonebreaker.

By the Court: Did he help you?

The Witness: He didn't write any on the papers, but he did talk to me, tell me some of the things.

By the Court: Q. Where did you get the paper to write these appeal papers on?

The Witness: Well, at that time they would furnish you letter-writing paper, and I asked for some extra sheets; and then I got some of this paper from pads that were used to mark shirt sizes.

By the Court: Q. When did you have the time to write these papers?

The Witness: You can write them in your cell at night.

By the Court: Q. You didn't have Goodman and
131 Crouch and Stonebreaker in your cell?

The Witness: No.

By the Court: Q. When did you see them?

The Witness: Well, they would write these pleadings and give them to me, and I copied them. They saw me during the day.

By the Court: Q. Where would they see you?

The Witness: Where I was working.

By the Court: Q. Where were you working?

The Witness: In the shirt shop.

By the Court: Q. Did they work in the shirt factory?

The Witness: Goodman did, yes. Stonebreaker worked in the cell house for a while, then he was a runner, would go around over the institution. I would see him frequently that way. And then on Saturday afternoons they had baseball games there, and you could see them at those times. I saw Crouch at one of these baseball meetings.

By the Court: Q. Were they helping all of the prisoners? How did you get next to Crouch, Stonebreaker and Goodman?

The Witness: Well, when I came in, Crouch and Stonebreaker told me that they thought I should not have
132 been convicted, and told me that I should appeal the case.

By the Court: Q. How did you get acquainted with them?

The Witness: Oh, they were in the parole office when I came in—Crouch was, and I don't know for sure whether Stonebreaker was in there right at that time, or not.

By the Court: Q. Did you talk to them about your case first, or did they talk to you?

The Witness: No, it was routine, as I understood it, for a new man coming in, they questioned him about his case, asked him to make a statement, and Lloyd Crouch is the man who asked me about the case, and he told me at that time that he had read about it in the newspaper, and he typewrote out the statement that I made when I entered the prison.

By the Court: Q. How do you remember the names of these documents?

The Witness: Well, it was stamped on my mind pretty firmly at the time.

By the Court: Q. Do you remember what you had in them?

The Witness: Yes, I remember in substance what 133 I had in them.

By the Court: Q. What was in the assignment of errors?

The Witness: Well, in the assignment of errors we alleged that the trial court erred in overruling the motion for new trial, and that they failed to prove the venue.

I don't remember any other ground.

The Court: You may want to object to my next questions, Mr. Isham. If you do, I will hear you before I press the questions.

Q. You had Mr. Fitzgerald and Mr. Huggins as your attorneys?

The Witness: Yes, sir.

By the Court: Q. Did you write to them after you had gone to the Michigan City penitentiary?

The Witness: Yes, I did write.

By the Court: Q. How many times?

The Witness: Well, I wrote, it must have been about two or three times, that I can recall.

By the Court: Q. How soon after you got to Michigan City?

The Witness: Well, I think it probably was—I don't believe it was over a month, or so, after I got there.

134 By the Court: Q. What did you write to them about?

The Witness: Well, I asked them if the motion for new trial had been prepared and whether the Court had done anything about it.

By the Court: Q. Did they write you back?

The Witness: Well, I got one letter, one or two letters from Mr. Fitzgerald, and he told me—

By the Court: Q. Do you have those letters?

The Witness: No.

By the Court: Q. What did you do with them?

The Witness: Well, when I left there in 1938—

By the Court: Q. Left where?

The Witness: Left the prison in 1938, I was taken down to the jail, to the Circuit Court, I took them along with me, but I left them with my mother at that time, and we haven't been able to locate them.

By the Court: Q. How long were you gone from the Michigan City penitentiary?

The Witness: It was about five months.

By the Court: Q. Were you on parole?

The Witness: No; no, I was in jail.

By the Court: Q. At Jennings County?

The Witness: Yes.

135 Mr. Wall: That was during the petition for error coram nobis proceedings.

By the Court: Q. Going back to your trial, what error do you say happened in your trial that you were going to assert and present in your appeal?

The Witness: Well, we didn't think that the evidence was sufficient, and, for one thing, we didn't think that the venue had been established.

By the Court: Q. What do you mean by that?

The Witness: Well, I mean that the evidence strongly indicated that the venue was actually in another county instead of the county the trial was conducted in. And we didn't think that the evidence was sufficient, and we felt that the verdict was contrary to the law.

By the Court: Q. You had a jury trial?

The Witness: Yes, sir.

By the Court: Q. Did you testify?

The Witness: Yes, I did.

By the Court: Q. Did you have any other witnesses?

The Witness: Yes, sir.

By the Court: Q. You pled not guilty?

The Witness: Yes, sir.

136 By the Court: Q. To the charge of murder?

The Witness: Yes, sir.

By the Court: Q. Did both Mr. Huggins and Mr. Fitzgerald examine witnesses?

The Witness: Yes, they did.

By the Court: Q. Make arguments to the jury?

The Witness: Yes, both of them.

By the Court: Q. Who was the court reporter?

The Witness: A lady by the name of Virginia James.

By the Court: Q. From what city?

The Witness: I think she lived at North Vernon, Indiana.

By the Court: Q. Have you ever communicated with her?

The Witness: Yes, I did.

By the Court: Q. When?

The Witness: Not so very long after I was sent to the prison I wrote her a letter and asked her what the charge for the transcript would be, and she wrote back and said she couldn't tell exactly but it would be between $200 and $250.

By the Court: Q. Is she still there?

The Witness: I understand she is reporting in

137 another county at the present time.

By the Court: Q. Do you know whether or not she has her notes of this trial?

The Witness: No, I don't know whether she has, or not, for sure. I have been told she did not.

By the Court: Q. Who told you that?

The Witness: Well, when the Attorney General's Office filed their pleadings in opposition to the petition for allowance of an appeal they included her affidavit to that effect.

By the Court: Q. Did you ever write to Mr. Fitzgerald or Mr. Huggins about your wish to take an appeal?

The Witness: Yes. You see, Mr. Huggins was considered chief counsel in the case; he was an older man. And Mr. Fitzgerald's father had died; I had Mr. Fitzgerald's father, too, and he had died, and it left us without a good wheel horse, you might say, and so Mr. Huggins was considered chief counsel, and a good deal of the communication was with Mr. Huggins.

By the Court: Q. Well, what did you write to them about your appeal, or to Mr. Huggins?

The Witness: Well, I wrote, asked them—I asked Mr.

Huggins if we could appeal the case. I remember
138 receiving one or two letters from Mr. Huggins, and he said, yes, we could appeal the case, and he indicated that would be proper.

By the Court: Q. Then did you ask him to go ahead, or what?

The Witness: Well, I didn't have any money to pay him with.

By the Court: Q. Did he ask you for money?

The Witness: Well, I don't recall that he asked me outright nor in a letter for money. My sister had told me that if there was an appeal taken we would have to pay some more money than what we had paid the attorneys.

By the Court: Q. She told you that on a visit?

The Witness: No, I think she sent me that in a letter. And then just before I was brought from the jail at Jennings County to the prison, why, the Sheriff and Mr. Huggins and Mr. Fitzgerald and my sister, and I am pretty sure my mother, were at the jail, and Mr. Huggins and Mr. Fitzgerald told me they would prepare and file a motion for new trial, and that if it should be overruled, then we would have to appeal, and we would have to pay for the appeal.

By the Court: Q. How long was the jury in deliberation?

139 The Witness: Well, let's see; I think something like an hour.

By the Court: Q. Had you always lived in Jennings County?

The Witness: No, I had never lived in Jennings County.

By the Court: Q. Where did you come from?

The Witness: I was born and reared in Jackson County; I was born on a farm out east in Jackson County, and then when I was fourteen my parents moved to Seymour and I lived there until I went to Cincinnati, Ohio, to work.

By the Court: Where were you living when this alleged crime occurred?

The Witness: In Norwood, Ohio.

The Court: I will permit additional questions, if they are not objected to, on anything I have asked.

Mr. Isham: I can't think of any further questions I would like to ask.

Mr. Wall: I have a couple of questions.

Cross-Examination by Mr. Wall.

Q. You said men by the name of Crouch, Stonebreaker and Goodman became interested in you and asked you
140 about the details of the alleged crime after you entered the prison?

A. Yes.

Q. So they helped you prepare the papers you have been telling the Court about?

A. Yes.

Q. Did any of these three men tell you you could not send any papers out of the prison, that that was the rule?

A. Yes, they told me that, too.

Q. Did they give you any excuse as to why they should go ahead, prepare these papers for you, if that was the rule, and they knew it?

A. I told them that possibly if I had my sister come down and see the warden, that he would allow her to take them, and they expressed doubt as to whether that could be done, or not, but they were anxious to have the rule at least modified, and they more or less used that as a means of testing the matter.

Q. Well, they had talked to you about this rule before you had had your sister come up and try to get the paper?

A. Oh, yes; yes.

Q. And they even told you that about the rule before you talked to this Mr. Marks, that you told us about?

A. Well, I couldn't say for sure about that, because I talked to Mr. Marks the first time a very short time
141 after I got there.

Q. But didn't you tell us Mr. Crouch, I believe it was, talked to you almost immediately after you got there and typed out your statement?

A. Yes.

Q. You made that statement within a few hours after your arrival in the prison, didn't you?

A. No, I think this was probably maybe a week later.

Q. Well, within a week, anyway?

A. Yes.

Q. So he talked to you even before Mr. Marks did, didn't he? Mr. Crouch, I am talking about.

A. Well, I expect he did. I was taken in the prison and I was—well, I was placed in "B" cell house right away, and he had charge of "B" cell house.

Q. Who?
A. Mr. Marks.
Q. Did you hear him testify he only had charge of "B" cell house one day, as I recall his testimony?
A. I understand his testimony to be that way.
Q. Do you mean to tell the Court now Mr. Marks was in charge of "B" cell house for some period of time?
A. Yes.
Q. How long would you say?
142 A. Oh, I don't know. He was over there quite a little while.
Q. So you don't remember or didn't hear his testimony he was on duty that one day?
Mr. Isham: I object to the question, assuming a fact not in evidence.
The Court: Objection sustained.

By Mr. Wall:

Q. Isn't it true, Mr. Cook, that at the time you arrived in the prison there was considerable trouble because one man named D. C. Stephenson, perhaps others, had been trying to smuggle appeal papers out of the prison, and that you knew about it?
A. Well, actually, no; I was a new man coming in there, and no one knew me, no one knew anything about me.
Q. They soon learned about you, some of these men did?
A. Yes.
Q. They were interested in you, you said?
A. They expressed an interest in me because there was considerable publicity about this case in the newspapers. These gentlemen told me they had read the newspapers and they felt it was a miscarriage of justice, and they felt so strong about it they said they wanted to do something about it, if they could.
143 Q. Do you mean to tell me after you had been there a few days you didn't know there had been some trouble about smuggling out papers with other people, and that the prison authorities were tightening up the rules concerning those things?
A. Oh, yes; I heard they were very strict about this.
Q. What I mean is, you heard that the strictness occurred because of the actions of one D. C. Stephenson or other prisoners within a year or two prior to your arrival there, isn't that true?

A. There was a good deal of talk about Mr. Stephenson, all right.

Q. And about him or other prisoners trying to smuggle papers out, without going through the Warden's office?

A. Well, I don't know about that. I don't seem to recall it. I heard a good deal of talk along that line.

Q. All right; that is the best you can do.

Isn't it true, and you so understood it, that this rule you say you were told about, that no papers could be sent out of the prison, was one that really meant, and you so understood it, no papers could be smuggled out; they had to be presented to the Warden; isn't that true?

A. No, that is not.

Q. That is not the way you understood it?

144 A. No.

Q. You said you had part of these papers in this man's custody, the man whose cell was not searched, I believe you said; is that right?

A. I was told that, yes.

Q. Well, told what, that his cell was not searched very often?

A. Yes.

Q. Did you think when you gave him those papers they would be placed in his cell, because it was not searched?

A. No, I didn't think that.

Q. Why did you give them to him?

A. I thought they would be safe in his charge in this receiving department where there were many places to conceal papers. I didn't expect those papers to be left out in the open.

Q. Then the fact you said you learned his cell was not searched did not have anything to do with your giving him those papers?

A. Well, his cell was not searched; his quarters weren't searched, where he worked wasn't searched.

Q. Was he the only man who worked in those quarters you are talking about?

A. No.

Q. They had other men working there?

145 A. Yes.

Q. It was open to the guards, the Warden and Deputy Warden to search any time they wanted to?

A. Yes, it was.

Q. That was your understanding about why you wanted him to take them?

A. Yes.
Q. Did he volunteer to take them, or did you ask him to?
A. I asked him if he would keep them.
Q. Was that thought on your part brought about by any search of your cell prior to that time?
A. Oh, yes, my cell had been searched.
Q. Well, I mean in connection with your preparation of papers for this appeal.
A. I don't know the reason it was searched.
Q. Well, was it searched after you had started these papers?
A. Oh, yes.
Q. Where did you have them then?
A. I used to carry them out in the morning.
Q. On your person?
A. Yes.
Q. Now, those cells, as I understand it, were all open; the guard walked back and forth occasionally?
A. At night, yes, he did.
146 Q. Wouldn't the guard go back, see you working with paper and pencil, or pen and ink?
A. He could, yes.
Q. That was the only place you had to work on them?
A. Yes.
Q. Nobody searched your cell or took anything away from you night after night as you were preparing them?
A. No. These searches didn't take place at night; they took place in the daytime, when the prisoners were out of their cells.
Q. The fact is, when you were preparing the papers, you didn't know anything about them not being able to be taken out of the prison; isn't that right?
A. I had been told you couldn't take them out.
Q. Did you prepare these papers with the thought you were going to try to smuggle them out, since you knew the rule was you could not send them out?
A. No.
Q. You were still hoping against hope they would go out?
A. I was hoping that the Warden would relent and change his mind about it.
Q. Now, you say you were not in the meeting when Mr. Kunkle became Warden in which he gave them some information about a supposed change of rule?
147 A. No, I can't recall it.

Q. I am not sure, did you say you did not hear about that change of rule at any time?

A. Yes, I did say that. I didn't hear about it.

I even inquired in the last six or eight months of some prisoners that were there at that time, and one of those prisoners tells me, yes, that happened, and another prisoner tells me that he does not recall any such thing.

Q. After this thing was supposed to have happened, did you notice an item in posters, proclamations, or papers posted up, for those people who were not at the meeting, notifying them about the change?

A. No, I didn't.

Q. Didn't Mr. Crouch, or Mr. Stonebreaker, or Mr. Goodman, who had been talking with you, inform you there had been a change?

A. No.

Q. And that you could now send the papers out?

A. No, I don't believe that they did.

Q. They seemed to be pretty well aware of the general rules around there prior to that time, didn't they?

A. Yes.

Q. But they never said a word to you afterwards about this change of rule?

148 A. In fact, I am almost sure Mr. Crouch had left the prison by that time.

Q. How about Stonebreaker?

A. Stonebreaker, I didn't see him; he was transferred over to another assignment. I hadn't seen him for some time.

Q. You got to see him at baseball games, recreation periods?

A. You could see him then, but I didn't go see him because he had already helped me a good deal, and I didn't like to impose on him further.

Q. Did Dick Sweet ever help you prepare these papers or advise with you?

A. No, he didn't.

Q. Or Mr. Dale Shipley?

A. No.

Q. Or Mr. Tucker?

A. No.

Q. And no one told you about this change of rule?

A. No. However, Mr. Wall, I learned that some papers were going out; I learned Mr. Kunkle was permitting papers to go out.

Q. Why didn't you try to get them out, why didn't you see him, the new Warden?

A. Well, the reason I didn't ask Mr. Kunkle to send these papers out was because I felt that I had already
149 lost my appeal, and that there was no point in sending these papers out because my time had run out.

Q. That was the reason you didn't do it?

A. Yes.

Q. After you learned something about it?

A. Yes; that was the reason.

Q. Now, you say you kept these papers containing a recital of the evidence or facts as you knew them, which were exhibited to the Court but not introduced, you had them hidden another place?

A. Yes.

Q. Where were they hidden?

A. I had them hidden in a shirt bin in the shirt shop.

Q. Were they in this bin for some period of time?

A. Yes, for quite a little while.

Q. About how long would you say?

A. Well, they were actually in this bin until I was transferred out of the shirt shop.

Q. Can you give the Court some idea of the time, or when you were transferred out of there?

A. I was transferred into the book bindery, it must have been along in—it must have been in the winter of 1933.

Q. All right. In the winter of 1933 you were transferred out of the shirt department?

150 A. Yes.

Q. How long would you say you had these papers you have been talking about in that shirt bin?

A. Well, I had them in there until the time I was transferred out of there.

Q. I say how long. You said until you were transferred. When did you put them in there?

A. Well, I put them in there after they were finished, and they were finished in January, about, 1932.

Q. So they were in there perhaps more than one year, in this bin?

A. They were in there that long.

Q. In this one place, in this one bin?

A. Except such times as I might take them out to consult with someone about them.

Q. But you put them back always in the same bin?

A. Yes.

Q. Will you tell me briefly what kind of bin this was, where it was located?

The Court: Is it very important?

Mr. Wall: No, except to affect his credibility. From the type of bins, he couldn't have hidden them a whole year without detection.

Will you answer the question?

151 A. This bin was made so that shirts ran off of a machine into this bin and then they were taken out on the other side. Well, up under this bin there was a place cut in the board, and you could run these papers up under this tabletop into this cut-away place in the board, and they weren't noticeable to detection by even looking in the bin.

Q. Could you reach a hand in there and find them?

A. Yes, you could reach your hand in there.

Q. Didn't they change those bins every once in a while, Mr. Cook?

A. No they weren't changed.

Q. You mean it was sitting on the same side of the shirt machine?

A. Yes.

Q. Wasn't it emptied, filled, or moved?

A. Yes, it was emptied and refilled.

Q. That was done by other personnel or other prisoners?

A. Oh, yes.

Q. You were not afraid they might be discovered during all those months while this was going on?

A. I was constantly in fear it might be discovered, yes.

Q. Why didn't you then give it to this man?

You say his quarters were never searched. Why didn't you give it to him, as being a much safer place for it?

152 A. Well, this was, I felt, a reasonably safe place, and I didn't want to place all of them in one place. I was trying to preserve them by scattering them around.

Mr. Wall: That is all.

By the Court: Q. You say Mr. Crouch suggested that you ought to appeal your case?

The Witness: Yes, he did.

By the Court: Where was Mr. Crouch from, where was his home?

The Witness: Well, he told me and other prisoners told me that he was from Columbia City, Indiana, and he was formerly mayor of Columbia City.

By the Court: Q. You say he stated he knew about your case from newspapers?

The Witness: Yes.

By the Court: Q. And because of that newspaper report he formed the conclusion expressed to you, that you ought to appeal your case?

The Witness: Yes, he did, and he talked to me, too.

By the Court: Q. What newspaper did he see that in?

The Witness: Well, I don't know.

By the Court: Q. Did he tell you?

The Witness: There are a great many newspapers.

153 No, he didn't specify any particular newspaper.

By the Court: Q. Did you ask him?

The Witness: No, I didn't.

By the Court: Q. Did you have any newspaper articles of your trial indicating any of the proceedings there?

The Witness: Well, I have some newspapers over at the prison now, but I doubt whether they would show that.

By the Court: Q. What was there in these newspaper articles which would indicate to a stranger, such as Mr. Crouch, that you ought to apply for an appeal, or take an appeal?

The Witness: Well, during the course of the trial the Indianapolis Star and the Indianapolis—at least another Indianapolis paper, I don't know whether it was the News or Times, and the paper, Free Press, and the Louisville Courier-Journal, all those papers had a wide coverage of that case, and rather detailed coverage of it. They even went so far as to list questions and answers in some places.

By the Court: Q. Mr. Crouch indicated he had read some of those newspapers, did he?

The Witness: Yes, he told me he had.

154 By the Court: Q. Did Mr. Fitzgerald or Mr. Huggins ever indicate to you you should take an appeal?

The Witness: Yes; it was my understanding that they felt it would be advisable.

By the Court: Q. How did they indicate that?

The Witness: Well, they told me that; they said—

By the Court: They told you how?

The Witness: They told me.

By the Court: Q. When, where, and how, by talking to you, or writing to you?

The Witness: By talking to me.

By the Court: Q. When?

The Witness: After the return of the verdict, and before I was taken to prison.

By the Court: Q. Have they ever put anything on paper indicating their views as to whether or not there was error in the proceedings in the Jennings Circuit Court?

The Witness: Well, not that I know of.

By the Court: Q. You have never had any written communication from them to that effect?

The Witness: No, I have not.

By the Court: Q. Have you ever asked them to
155 to put anything on paper as to their views about questions that might arise on appeal?

The Witness: No, I didn't ask them to.

The Court: Is there anything further?

Redirect Examination by Mr. Isham.

Q. They did prepare a motion for new trial, did they not?

A. Yes, they did.

Q. Are you familiar with the contents of that motion? You have read the motion and are familiar with the contents, are you?

A. Yes.

Q. I want to hand you what purports to be a copy of it, and ask you to refresh your memory from this, and state what the grounds are that are enumerated there.

A. Yes, I think this is a true copy of the motion for new trial.

Q. Will you just state, by refreshing your memory, what the grounds for motion for new trial are?

A. That the verdict of the jury is contrary to law; that the verdict of the jury is not sustained by sufficient evidence; that the verdict of the jury is contrary to the law and the evidence; that the court erred in giving to the jury of its own motion each of the instructions sep-
156 arately and severally numbered from 1 to 41, inclusive; that the court erred in denying the defendant's motion for the court to direct the jury to return a verdict of acquittal.

Those are the grounds.

Q. Now, I will ask you to state, Mr. Cook, if you have not discussed with your attorneys, after the verdict, even before the verdict, their views about whether or not there had been any proof of the corpus delicti.

A. Yes, I did talk to them.
Q. What was their view about that?
A. They didn't think there had been.
Q. You understand what corpus delicti means now?
A. Yes.
Mr. Wall: I believe it is objectionable. I don't want to be technical.
The Court: Well, I went into it.
Mr. Isham: I don't want to bore anybody by this.

By Mr. Isham:.

Q. There was a grave question about the venue of the case, as the State attempted to prove it, was there not?
A. Yes.
Q. In which county, under the State's theory?
157 A. Yes, sir.
Q. I will ask you to state if the entire case was not based on circumstantial evidence.
A. Yes, it was.
Q. Was it not a fact one of the reasons this case achieved the publicity it did at the time was because of the unusual circumstance of a lady being killed in an automobile wreck, out of which grew a charge of murder?
A. Yes; that is right.
Q. When was the indictment returned after the death of your wife?
Mr. Wall: We object, your Honor, going into all this detail.
The Court: Well, I went into it. I am going to overrule the objection.
You may have the same privilege.
A. You see, this wreck occurred on the night of November 28-29. I was rendered unconscious and remained so for approximately thirty-six hours. I was in a hospital when I regained consciousness, and I was not permitted to go to my wife's funeral. And then I talked to the coroner a week or so later, to pay his bill, and he told me he had investigated it and that his verdict was accidental death by broken neck. Sothen I heard that there was
158 a grand jury investigation made, although I don't know that to be a fact, and then about five months, or five and a half months later, why, my wife's mother filed an affidavit against me charging me with murder, and I was arrested on a warrant taken from that affidavit, and given a preliminary hearing before the Mayor of North Vernon.

and he bound me over to the Circuit Court, and set my bond at $10,000.

Well, at that time I couldn't fill that bond, so I was taken to the county jail, and some time later, a month or so later, why, Mr. Fitzgerald went down and filed some sort of pleading, I don't know exactly what it was, or he might just have made an oral request, I don't know, but, anyway, I was taken into the clerk's office in the Courthouse at North Vernon and the Judge was there, and Mr. Fitzgerald asked that the bond be reduced, so the Judge—Judge Carney was the judge—reduced the bond to $7500, and I still couldn't fill that much bond, so I stayed in jail a while longer, and an acquaintance of mine came down and said he just found out where I was, and wanted to know why I didn't send for him before that time, and he offered to sign the bond, so he signed the bond. Judge Carney approved the bond and I was released.

I stayed out until after I was indicted by the grand jury, and then I was rearrested. Judge Carney offered to
159 extend my bond again, said all I needed to do was resign the bond and he would release me on the same bond, but the Prosecuting Attorney objected to it, and he said he had some evidence he wanted to submit to the Court, so then Judge Carney held the release on the bond up for some time, and then finally he said, "Well, I don't believe I will release you on bond," so he didn't do so, and I remain in jail then until my trial.

Q. Just one more question:

Mr. William Fitzgerald was in partnership with his father at the time you got in trouble, was he not?

A. Yes.

Q. I believe you said that his father died some time shortly before the trial?

A. Yes.

Q. Do you know about how long before the trial it was that his father died?

A. Well, I expect it must have been six months, I imagine. I don't know just how long it was.

Q. Mr. Huggins was a lawyer from Louisville, was he not?

A. Yes, he was.

Mr. Isham: I think that is all.

160 *Recross Examination by Mr. Wall.*

Q. You said in this accident in which your wife was killed you were unconscious for thirty-six hours; is that right?

A. Yes.

Q. Isn't it a fact that when the officers came up to you, you were sitting on the running-board?

A. No.

Q. And you talked to them, and your wife was lying down on the edge of the river, or the edge of a ditch?

A. No.

Q. Isn't it true you collected insurance money for the death of your wife?

A. There was one policy payable to me and there was one policy payable to the estate of my wife.

Q. One payable to you, is that right?

A. Yes.

Q. And you collected on that policy?

A. That is correct.

Q. You were tried by jury, weren't you?

A. Yes, I was.

Q. Didn't three people positively identify you as being the man who came through there with the automobile and stopped to inquire which direction, or something like that?

A. Well, there were three people.

161 Q. And they were strangers to you; there was nothing you knew about them, why they should be against you, was there?

A. Not at that time, but since then.

Q. And your attorneys were capable, keen attorneys, and represented you well, isn't that true?

A. I believe they were. I believe they did the best they could.

Q. They submitted a lot of instructions and made arguments in the trial?

A. Yes, they did.

Q. Isn't it true they told you they did not believe you had much chance on appeal?

A. No, they never did tell me that.

Q. They never told you they thought you had a chance, and that you should appeal it and try to reverse it, did they?

A. They told me they thought an appeal would be the proper thing.

Q. But you never followed it up?

A. No; I couldn't follow it up.

Mr. Wall: That is all.

The Court: I have one more question. It is entirely collateral. If either counsel objects, I think I will not go into it.

Q. Have you ever applied for parole?

162 The Witness: Yes, your Honor, I did, at one time.

By the Court: Q. When?

The Witness: 1947.

By the Court: Q. Was that the first time?

The Witness: Yes.

By the Court: Q. You just became eligible under the rules of the Parole Board?

The Witness: No, I had been eligible for a year, I guess.

By the Court: Q. That was about two years ago?

The Witness: Yes.

Mr. Wall: About a year and a half, I think, your Honor.

By the Court: Q. What happened?

The Witness: Well, they denied it.

By the Court: Q. Did they give any reasons?

The Witness: No, I never received any.

By the Court: Q. From the time you came before the Parole Board to state your views regarding the parole to the time you received word it had been denied, how long a time elapsed, or did you appear before the Parole Board?

The Witness: No, I didn't do it, although my

163 sister did.

By the Court: Q. Who?

The Witness: My sister.

By the Court: Q. From that time until the decision, how long was it?

The Witness: Well, let's see; it was heard in March, and the final denial was in July, I believe.

By the Court: Q. You have not made any further applications?

The Witness: No, I have not.

Mr. Isham: He is not eligible, your Honor, for two years after it has been denied.

By the Court: Q. What have you been doing in the prison?

The Witness: Well, when I first went there, I worked in the shirt shop, and then in the book bindery, and then I worked in the shoe shop, clerk in the shoe shop, and then I worked as clerk in the store room, and from there I worked in the book bindery again.

By the Court: Q. What have you been doing lately?

The Witness: Lately, since last May, I have been working in the parole department.

164 By the Court: Again, this is collateral, not pertinent to the issue, I suppose:

Q. Have you had any disciplinary marks against you?

The Witness: Well, one time I had a disagreement about my sister taking some notes of a conversation we were having at the time she visited me.

By the Court: Q. Is that the only thing?

The Witness: Yes.

I had a sandwich in my pocket one time.

By the Court: Q. You got some demerits for that?

The Witness: Yes.

By the Court: Q. You have not been in any fights?

The Witness: No, never been in any fights.

The Court: That is all I have.

(And thereupon the witness was excused.)

Mr. Isham: It is stipulated between the parties that whereas the respondent has, by answer, averred that he was not advised as to the facts contained in rhetorical paragraph 9 of plaintiff's petition, it is now agreed

165 that the facts stated in the opinions cited in said paragraph of said petition, to-wit, *Cook* v. *State of Indiana*, 219 Ind. 234, 37 N. E. (2d) 63, and *State ex rel. Cook* v. *Wickens*, 222 Ind. 365, 53 N. E. (2d) 630, are the facts, that is admitted by both parties in this cause, so far as they are set forth therein.

It is further stipulated that the records in the office of the Clerk of the Supreme Court of the State of Indiana from June 1, 1931, to June 1, 1932, relating to criminal appeals taken in that period, disclose no criminal appeal taken during said period *pro se*.

The Court: What does it show after 1932?

Mr. Isham: That goes until the statutory period for taking an appeal expired.

The Court: Do you have any idea what it shows after this alleged period?

Mr. Isham: Yes, I do have, your Honor.
The Court: You mean—
Mr. Isham: I don't have any documentary evidence, but I do know what the record discloses.
Mr. Wall: The stipulation is correct, as far as it goes, for that one year.
The Court: Can you jointly inform the Court what happened after Warden Daly left?
166 Mr. Wall: I can't; I haven't checked the record, so I would not be able to make a statement myself.
The Court: Do you rest?
Mr. Isham: The petitioner rests.

(And here the petitioner rested.)

And thereupon the respondent, to support and maintain the issues on his behalf, introduced the following evidence:

Mr. Wall: The respondent would now like to offer in evidence, your Honor, Respondent's Exhibit 1, which purports to be a transcript of record caused to be made by the petitioner in his attempt to appeal from the latest Supreme Court decision, Supreme Court of the State of Indiana, concerning his delayed appeal, on his petition for writ of certiorari to the Supreme Court of the United States.
Mr. Isham: No objection.
The Court: Admitted.
(And thereupon Respondent's Exhibit 1 was admitted in evidence.)
Mr. Wall: I might state it is our theory of this case that the petitioner is alleging as his grounds for habeas corpus in this, the Federal Court, that he was denied
167 the right granted to him by the Constitution of the United States, and that he did not have equal protection of the laws, as set forth in the Fourteenth Amendment. Our theory of it, and the only reason we would introduce this exhibit is to show that he presented that same theory to the Supreme Court of Indiana in connection with his petition for permission to file; that he set forth that same question, the identical one raised here, and it was ruled on adversely to him by the Supreme Court of Indiana, and writ of certiorari was denied by the Supreme Court of the United States.

HARRY D. CLAUDY, a witness called on behalf of the respondent, having first been duly sworn, testified as follows:

Direct Examination by Mr. Wall.

Q. Will you state your name?
A. Harry D. Claudy.
Q. Where do you reside?
A. South Bend, Indiana.
Q. Where are you employed now?
A. Oliver Corporation.
Q. Were you at any time between 1930, 1931 and 1932, connected in any capacity with the Indiana State Prison?
168 A. Yes, sir.
Q. What capacity?
A. Deputy Warden.
Q. During what period of time did you hold that office?
A. Well, from October, 1925, to November, 1933.
Q. Now, during that period of time, do you recall one of the inmates there by the name of Lawrence Cook?
A. I recognize him here.
Q. The gentleman sitting over there?
A. Yes.
Q. You have heard his testimony to the effect he understood there was some rule prohibiting any prisoner from sending any papers, especially legal papers, out of the prison during 1930, 1931, 1932, and for some time thereafter; you heard that testimony?
A. I heard that testimony.
Q. I will ask you to state whether or not you heard of any such rule that was in existence at the Indiana State Prison at any time during the years 1929, 1930, 1931 and 1932 concerning that matter.
A. No, sir; if they were open and aboveboard with it there wasn't any reason why they couldn't send it out.
Q. Now, I want to ask you whether or not for some time prior to Mr. Cook's arrival at the prison in 1931
169 there had been any trouble with certain inmates trying to smuggle appeal papers out of the prison without going through the Warden's office.
A. Yes, sir.
Q. Now, was there any new policy adopted with re-

gard to that situation concerning the manner in which such papers should be presented to anybody in the prison before they were sent out?

A. Yes, sir, it always had been.

Q. What was that, if you know?

A. It always had been there was nothing to be smuggled out or carried out by any officer, outside of going through the proper channels.

Q. When you say "proper channels," will you tell the Court what you mean by that?

A. That is going through the mail and getting the proper inspection, or a paper like he was getting out was to be handled through the Warden and looked over.

Q. I will ask you to state whether or not, if you know, any of the guards or new guards who were employed were informed they had no right, or that inmates could not send out papers from the prison at any time.

A. No; the officers when they were hired had a book of rules, every officer was given a book, and they were not to take anything from a prisoner, receive nothing.

170 Q. I will ask you to state whether, to your knowledge, Warden Daly had any such rule that no papers were permitted to be sent out of the prison by any inmate, appeal papers or anything pertaining to courts or cases.

A. Not to my knowledge.

Q. Do you have any knowledge of whether or not, during the years 1929, 1930 and 1931, the Warden acted upon and sent out papers, legal papers of various kinds?

A. Well, anyhow, they were on his desk. I imagine they went out.

Mr. Isham: I move to strike out what he imagined.

The Court: The latter part of the answer may be stricken, what he imagined.

By Mr. Wall:

Q. What do you mean, you saw them on his desk?

A. Yes.

Q. What disposition was made of them, I understand you say you don't know?

A. Not at that time, I didn't know.

Q. I will ask you to state if you received any letter from Mr. Cook or his sister after you had left the prison in which you were requested to sign certain affidavits for him?

171 A. Yes, sir.

Q. Where were you living at that time?
A. South Bend.
Q. Do you know now whether that was in 1946 or 1947?
A. No, I didn't pay any attention. It must have been about 1945.
Q. Now, do you recall, in that letter you received, whether or not there was some blank affidavit attached?
A. Yes, sir.
Q. I will ask you to state whether or not you ever answered that letter.
A. I sent the affidavit back.
Q. Did you at any time execute any of those affidavits which Mrs. Cook, his sister, sent you?
A. No, sir.
Q. I will hand you a sheet of paper supposed to be a reproduction of your letter. Take a look at it, examine it, and I want to ask you a question about it.
Do you recognize that as a copy of the letter you wrote her?
A. Yes.
Q. I believe you did state something in there you knew about rules, the last paragraph on this page.
A. I say "There was rules—
Q. "There was rules at that time that forbid a 172 inmate to send out whatever the papers were."
Can you tell the Court what you meant by that statement?
A. Without going through the proper channels.
Q. I believe you stated in that letter that it had been a long time ago, and for that reason you could not sign any papers?
A. Yes, sir; I would be signing something that wouldn't do her any good.
Q. Let's get down to the truth of it. Did you, or did you not, know of the existence of any rule forbidding an inmate to send papers out during the time just spoken of, from 1929 to 1932?
A. Not when they went through the proper channels, going through the Warden.
Q. Did Mr. Cook at any time talk to you personally about sending any papers?
A. I wouldn't swear to that. It has been a long time. He could have done so.
Q. You haven't any recollection about any time, if he did talk to you about it?

A. He evidently did. It is so far back, so much time elapsed.

Q. Were you present in the prison when Warden Kunkle came into office?

173 A. Yes, sir.

Q. Do you recall any time when he called a meeting or had the prisoners assemble in connection with some supposed rule about papers being sent out of the prison?

A. If he did, it was after I left there the last of October.

Q. You don't know anything about it yourself?

A. No, sir.

Mr. Wall: I believe that is all.

Cross-Examination by Mr. Isham.

Q. Did I understand you correctly to say that you did not remember about Mr. Cook's talking to you about the appeal papers?

Can you answer the question?

A. Could you go back sixteen years and two months and tell who was in your office?

Q. I don't suppose I could.

A. No, I couldn't.

Q. Do you say you don't remember whether he ever talked to you, or not, is that your best present impression?

A. I just got his word for it.

Q. You would not say that he did not, or that he

174 did, but that you don't remember; is that correct?

A. I can't recall that far back.

Q. But you don't say he did not talk to you?

A. I couldn't say he didn't.

Q. Now, at that time, in 1931 and 1932, who was the Warden?

A. Daly, Walter H. Daly.

Q. And you were the Deputy Warden?

A. Yes, sir.

Q. The procedure was, if a prisoner wanted to get out any kind of paper, it was to go through the proper channels, wasn't it?

A. Yes.

Q. Now, those channels consisted, in the case of legal papers, at least, in getting them to the Warden, didn't they?

A. Yes.

Q. He had to pass on whether any kind of paper would go out, or not?

A. Yes.

Q. Now, you were the Deputy Warden?

A. Yes.

Q. If you acquired a paper a prisoner wanted to get out, would you pass on it or hand it to Mr. Daly?

A. It would go to Mr. Daly.

Q. And you would see it got to him, is that correct?

175 A. If he hadn't talked to him before. According to his testimony here today, he talked to Daly first. Of course, if he turned him down, there wouldn't be any reason for me to.

Q. Then he presumably told you he had talked to Daly when he talked to you?

A. According to his testimony today he talked to Daly first.

Q. So that, once he told you he talked to Daly, you would not take it to the Warden; is that right?

A. If he had told me.

Q. Were there any papers of any kind which went through proper channels which were suppressed?

A. Yes, I have known some.

Q. Were there any legal papers that went through proper channels which were suppressed?

A. They weren't all legal that went through.

Q. Were there any legal papers that went through?

A. Some legal documents was in there, but we have come in contact with—whether you are familiar with it, or not—invisible ink, which would be written by certain chemicals.

Q. Now, may I ask this question again: Were there any legal papers that went through the proper chan-

176 nels that were suppressed?

A. Not those that were properly filled out, unless there was something, as I say, with invisible ink, that was trying to be smuggled out.

Q. Otherwise, that was not the case?

A. Yes.

Q. Now, you say that some time before this there had been some smuggling of legal papers?

A. Yes, sir; some employees let out on account of it.

Q. Why was it necessary to smuggle legal papers out?

A. It wasn't. If the Court wants me to explain it a little bit to you, I can explain it.

Q. I would like to hear it.

A. In 1925 D. C. Stephenson came there. Within six years, we will say, 1925 to 1931, his argument was Daly and I wouldn't let him hire attorneys, and the institution has it over there, if they kept the records, he had thirty-seven attorneys from the time he came in there up until 1932, and still he tried to smuggle stuff out and he did smuggle it out.

Q. Do you mean to say if he had an attorney—

A. Yes, sir.

Q. —he could not get a legal paper out of there?

A. Yes, sir, that is what he done; he tried to smuggle stuff out.

177 Q. He smuggled because he wanted to smuggle, not because he could not get them out?

A. Either that or just to be smart. Anyhow, he done it.

Q. So your contention is the trouble you had was Mr. Stephenson, who had attorneys on the outside representing him, and who could get legal papers out, but did not elect to do it, he smuggled them out?

A. He smuggled them.

Q. You wanted to correct that, didn't you?

A. Yes.

Q. So along about 1931 isn't it a fact that you started putting the squeeze on everybody on account or Stephenson?

A. Not if the papers was correct.

Q. Correct, what do you mean?

A. Well, if they were proper; if there was nothing in them that they were trying to smuggle out any message or anything on them, they could go out.

Q. Who determined whether they were trying to put some concealed message in there, who decided it, did you decide that, or the Warden?

A. The Warden.

Q. You had nothing to do with it?

A. I had nothing to do with it.

Q. Except you were Deputy Warden, you would take the paper, give it to the Warden?

178 A. He was the one that was the judge on it.

Q. Do you know one single instance where a man, during the years 1931 and 1932, having no lawyer on the

outside, presented his papers in the proper channels to Mr. Daly, correct papers, appeal papers, and they went out; do you know one case?

A. Well, my job was disciplinarian over the officers and men.

Q. Can you answer the question.

A. As far as Daly, he had his work to do, and I never butted in on it; I didn't have time.

Q. In other words, you don't know whether they ever went out?

A. I couldn't swear to that at all.

Q. Even if the papers went up under legal procedure and to Daly's desk, you don't know whether they got out of the prison, or not?

A. It wasn't up to me to put them out.

Q. I want to go back to another proposition a minute. You say you don't remember talking to Lawrence Cook about his appeal?

A. I couldn't swear that I did. All I got is his word for it.

Q. You made an affidavit in this case when it was down at Indianapolis, didn't you?

179 A. Yes.

Q. I believe the affidavit is in that transcript which is in evidence. I have here a copy.

A. I know what is in it.

Q. Let me read this, see if this is the affidavit you signed:

"H. D. Claudy, after being duly sworn, on his oath deposes and says:

"That he resides in the aforesaid county and state.

"Affiant further says that he was a deputy warden at the Indiana State Prison located in LaPorte County, at Michigan City, for a long time prior to 1931, and some time thereafter."

You remember that?

A. Yes, sir.

Q. "Affiant further says that at no time during his tenure of office as deputy warden was there ever a rule of the state prison forbidding inmates to send to the courts legal papers; that it has been called to his attention that one Lawrence E. Cook, now an inmate of said penitentiary, has filed with the Supreme Court of the State of Indiana, a petition for allowance of appeal; that, among other things, he alleges that within six months after his incar-

ceration he prepared, with the assistance of other
180 prisoners, an appeal to the Supreme Court of the
State of Indiana, but owing to the rule within the institution, the said Lawrence E. Cook was prevented from mailing to the Clerk of the Supreme Court said appeal papers."

Do you remember that?

A. Yes.

Q. "It has also been called to the attention of this affiant that the said Lawrence E. Cook further alleges that he came to the office of this affiant with legal papers, saying that they were to be used on an appeal of this case, and that this affiant is supposed to have told the said Lawrence E. Cook that he could not send out of the prison any papers of a legal nature, as it was against the established policy of the prison authorities."

Do you remember that?

A. Yes, sir.

Q. "This affiant states that there was no such rule and that oftimes, to his personal knowledge and recollection, papers were mailed out to the various courts of the state and of the nation, and this oftimes occurred even though the prisoner or inmate did not have a lawyer."

Do you remember that?

A. Yes, sir.

Q. "This affiant denies that said Lawrence E. Cook
181 came to him with legal papers, saying they were to
be used for an appeal, and this affiant further denies that he ever told said Lawrence E. Cook that he could not send out any legal papers from said prison."

Do you remember that?

A. I don't remember it.

Q. You remember that part of this affidavit?

A. Yes. What I meant, it would have to go out through the proper channels, what is what I meant.

Q. What do you mean by that?

A. Go through the proper channels.

Q. Let me read that again, see if you understand what it says:

"This affiant denies that said Lawrence E. Cook came to him with legal papers, saying they were to be used for an appeal, and this affiant further denies that he ever told said Lawrence E. Cook that he could not send out any legal papers from said prison."

A. He evidently told the Warden, he went to the

Warden first, and he was the one, by George, to go back to.

Q. Now, Mr. Claudy, you signed an affidavit under oath containing that statement?

A. With that understanding, any information or any papers that went out go through the Warden; that is
182 what it was intended for.

Q. I am talking about your stating under oath in this paper that you never did talk to Mr. Cook about appeal papers. You now testify you don't remember. Which is true?

A. He evidently talked to me.

Q. Then this affidavit is incorrect; is that right?

A. My affidavit was made, by George, with the understanding the papers could go out only through the proper channels. His testimony here this afternoon, he carried his papers out, put them, by George, out in the shirt bin.

Q. Let me ask you, you can understand this—

A. I can understand it.

Q. You made a statement under oath, did you not, that Cook had never talked to you about taking out appeal papers; is that right, did you do that?

A. I made an affidavit that those papers, by George, would go out properly, and they could go out.

Q. Well, now, what do you say about it, did you ever talk to him about it, or not?

A. He evidently talked to me.

Q. You want it to stand that way, that he did talk to you?

A. He evidently talked to me.

183 Mr. Wall: He is taking an unfair advantage. He ought to let him have the affidavit. He is breaking it up into sections. The witness may be confused.

Mr. Isham: The witness is perfectly able to take care of himself, as long as he adheres to the truth.

By Mr. Isham:

Q. Now, then, I want to read a little more:

"Affiant further states that Walter H. Daly, the then warden of said institution, is now deceased."

You remember that?

A. Yes, sir.

Q. "This affiant further states that, to his knowledge at no time during his regime as deputy warden was there ever such a rule forbidding legal papers to be sent out by prisoners to the various courts, and that at no time, to his

knowledge, did the said warden, Walter H. Daly, ever forbid the mailing out of legal papers by inmates to the courts, * * *"

A. No, he didn't; that is right.

Q. "* * * nor did this affiant ever receive any order from the then warden, Walter H. Daly, ever to refuse the mailing of any legal papers, either to the Supreme Court of the State of Indiana or any other court, but, on the
184 contrary, oftimes did permit, and at no time did he ever forbid, nor, to his knowledge, did any other official or employee of the then prison ever forbid, the mailing out of any legal papers to the Supreme Court of the State of Indiana or any other court."

A. That's right.

Q. Who prepared this affidavit for you to sign?

A. Who prepared it?

Q. Yes.

A. I made it up.

Q. Who sent it to you?

A. The Attorney General.

Q. The Attorney General's office sent you an affidavit, this is it, and you signed it; is that right?

A. That is it.

Q. Now, this is dated October, 1946, is it not?

A. Yes.

Q. You remember receiving a letter from Mrs. Florence Cook, I believe you said you did?

A. Yes.

Q. Do you remember that she enclosed an affidavit, asking you to sign it?

A. Yes.

Q. Would you recognize that affidavit if you would see it?

A. I don't see it signed.

185 Mr. Isham: Mark this Petitioner's Exhibit 1.

(For the purpose of identification, said instrument was marked Petitioner's Exhibit 1.)

By Mr. Isham:

Q. Is that (indicating Petitioner's Exhibit 1) the affidavit she sent you?

A. Well, I wouldn't swear to it. That has been a long time ago; that has been about 1945; it has been four years. It evidently is one of the copies she sent.

Q. Now, when she sent that, she also enclosed a self-addressed envelope to her, did she not?

I will ask you to look at the return you put on there (indicating), see if it is not in your handwriting.

A. That is not mine. This is my address. She evidently wrote that.

Q. If you recall, Mr. Claudy, didn't she misaddress two letters to you, and you finally got them?

A. I wouldn't swear to it.

Q. Don't you remember that she did not have your correct address and sent two leters, duplicates, one to one corporation, and one to another, in care of it?

A. I don't remember that.

Mr. Isham: Mark this Petitioner's Exhibit 2, and the envelope 2-A.

186 (For the purpose of identification, said instruments were marked Petitioner's Exhibits 2 and 2-A.)

By Mr. Isham.

Q. Do you remember writing this letter, Petitioner's Exhibit 2?

A. I expect that is the one I read a while ago, a duplicate.

Q. Will you read it aloud?

A. "Dear Mrs. Cook:

"Your two letters came to my home address yesterday.

"The reason I am with the Oliver Corporation.

"You will find papers and stamps inclosed unsigned.

"The reason I can not recall just what to place at that time.

"There was rules at that time that forbid a inmate to send out what ever the papers were.

"But that is water over the dam now.

"And after such a long time I would not think of signing any papers now."

It wouldn't have done her any good.

Mr. Wall: Read the rest of the letter.

A. (Continuing:)

"Am very sorry but my mind would have to be clear as to what was said.

Sincerely yours, H. D. Claudy."

187 Q. It was after you wrote this letter, which you just read, that you made the affidavit which I just read?

A. Yes.

Q. That the Attorney General's Office sent you, and you now say that affidavit is incorrect, that Lawrence Cook did talk to you about his appeal papers?

A. I said he could, he must have, because he said he did.

Mr. Isham: Now, your Honor, I would like to read these to the Court clearly, so that you understand the import of them.

We offer in evidence Petitioner's Exhibit 1, being the affidavit which Mrs. Cook sent to Mr. Claudy for signature, which was not signed.

The Court: Any objection?

Mr. Wall: No objection.

The Court: Admitted.

(And thereupon PETITIONER'S EXHIBIT 1 was admitted in evidence.)

Mr. Isham: I would like to reread it to the Court.

Mr. Wall: That is the one that was not signed?

Mr. Isham: That is the one that was not signed. I would like to call the Court's attention to the fact it 188 was not signed; that it contains two separate facts. One of them relates to a conversation that Lawrence Cook had with this gentleman about his appeal papers. The other fact relates to the existence of the rule or policy of the prison.

(Thereupon Mr. Isham read Petitioner's Exhibit 1 to the Court.)

Mr. Isham: We now offer in evidence Petitioner's Exhibit 2-A—

Mr. Wall: No objection.

Mr. Isham: This is the envelope which Mrs. Cook enclosed in her letter.

We also offer in evidence Petitioner's Exhibit 2, being the original letter which he wrote.

Mr. Wall: No objection.

The Court: Petitioner's Exhibits 2 and 2-A are admitted.

(And thereupon PETITIONER'S EXHIBITS 2 and 2-A were admitted in evidence.)

Mr. Isham: I would like to read Petitioner's Exhibit 2. I would like to read it a little plainer.

(Mr. Isham thereupon read Petitioner's Exhibit 2 to the Court.)

189 By Mr. Isham:

Q. You say there was no rule or policy in force in 1931 or 1932 forbidding prisoners from preparing legal papers, prisoners who did not have a lawyer outside?

A. Yes, sir.

Q. And sending them out.

Have you any explanation for your statement in this letter, Mr. Claudy, "There was rules at that time that forbid a inmate to send out what ever the papers were"?

A. If they were being smuggled out. Any time a fellow hides stuff, he is evidently putting something undercover, ain't he?

Q. Well, I am asking you, can you explain this statement?

A. I am telling you, I just meant what I said.

Q. You meant what you said.

There was some kind of a rule, wasn't there?

A. They had to go through the Warden.

Q. If they were handed to you, Mr. Claudy, as Deputy Warden—

A. Nobody handed them to me. After they once see the Warden, they don't hand anything to me.

Q. Suppose they hadn't seen the Warden.

A. They go to the Warden.

Q. Suppose they hadn't seen the Warden.

A. They can go to him.

190 Q. You were Deputy Warden; couldn't they hand you something, and you hand it to the Warden?

A. They could go out, explain it to him better than I could.

Q. I think they could, too.

Do you know Mr. Marks?

A. Yes, sir.

Q. And is he a truthful man?

A. Well, there were some things I didn't think were just right in his conversation, his testimony. He could have went up, talked to the Warden. I am not saying he didn't go up there and the Warden tell him.

Q. It was necessary, as I understand, to put some kind of special rule on after Stephenson kicked up in 1925; is that right?

Now, that was not a rule against smuggling papers?

A. That was watching for smuggled stuff, yes, sir, fellows going ahead, putting out more papers.

Q. Didn't you always have a rule?
A. Sure, that has been a rule all of the way through.
Q. But you did have to make some kind of rule change after that, didn't you?
A. We made it stronger, by George.
Q. How did you make it stronger?
A. Going up through the Warden.
191 Q. Didn't it always have to go through the Warden?
A. No; they could go through the mail room, get them out.
Q. You mean legal papers could be sent through the mail, before when?
A. They could be sent in the mail out to the mail room.
Q. Before when?
A. Well, I would say 1930.
Q. But after 1930 you changed the rule?
A. Changed the rule.
Q. Now, after 1930, you say that they had to go to the Warden's office?
A. They had to go there first.
Q. You don't know whether they ever got out, or not, I believe you said?
A. That is right. He is the one that takes care of the business.
Mr. Isham: That is all.

Redirect Examination by Mr. Wall.

Q. I want to ask one question: Did you ever tell any of the prisoners, including Mr. Lawrence Cook, that the rules forbid sending out any legal papers?
A. I never told anybody that, because they always
192 sent the papers out.
Mr. Wall: That is all.

Recross Examination by Mr. Isham.

Q. Do you distinguish between a printed rule and the established policy of the institution?
A. Printed rule, by George, there wasn't anything printed on it. We just made that ruling through the mail clerk—the Warden did; all stuff came out to him.
Q. This new rule you made in 1930 was not even printed?

A. No.

Q. That was the policy of the institution, but not printed?

A. It wasn't printed.

Q. Now, was there any policy of the institution not to permit prisoners to send out legal papers, prisoners that did not have a lawyer on the outside?

A. There wasn't any ruling on that.

Q. As far as you know, the only policy was that they had to go to the Warden, and you didn't know what happened after that; is that correct?

A. He is the head man. That was his work. My business was inside.

Q. You don't know whether they got out after that, or not?

193 A. I couldn't swear to that.

Mr. Isham: That is all.

The Court: I have a couple of questions, Mr. Claudy:

Q. Did you know a man by the name of Orville George?

The Witness: Yes.

By the Court: Q. What kind of work was he doing?

The Witness: He was in an office. Whether he was in the bath room—it seems to me like, my mind runs like he was in the bath room at the time; I can't swear to it.

By the Court: Q. Did you have a receiving department located in the old power house?

The Witness: Yes, they had; they fixed that up.

By the Court: Q. Did you know a man by the name of John Goodman?

The Witness: Yes, sir. He worried the life out of us. The judge sentenced him from South Bend. He is another one of the prison attorneys, like D. C. Stephenson.

194 By the Court: Q. How about Mr. Crouch?

The Witness: Crouch—they were all taking their orders from Stephenson.

By the Court: Q. What about Stonebreaker?

The Witness: He is another one.

By the Court: Q. What was Crouch, what was his job in there, what did he do?

The Witness: Well, at the last it seems like he was in the hospital, at the last. I wouldn't swear to that.

By the Court: Q. In 1932, was he in the receiving room, or in the mailing room or record room?

The Witness: It seems to me like Crouch was in the mail office.

By the Court: Not in the record room where they made up the records?

The Witness: I think maybe he was in the records. They would meet out on the ball park. That was one thing they were trying to break up, the bunch of prison attorneys they had doing attorney work in place of doing their work.

The Court: That is all I have.

195 *Recross Examination by Mr. Isham.*

Q. Did the receiving room ever have a bad fire?

A. It was after I left there. The old power house burned down in 1934, I think. I left there in 1933.

Q. You know it did burn down?

A. Yes, I knew about it.

Redirect Examination by Mr. Wall.

Q. Did they hide things in the shirt box?

A. Shirt bins, built in the shirt factory, where the fellows have their material and they have their shirts in there, various parts, and they put them together and they carry them away. You take the yokes and collars—

Q. I am asking you whether there was any place to hide things in those bins.

A. Not in the bins. Where they have their shells, they could have hid under there.

Q. That place would not be searched, or subject to search?

A. You have to search every nook and corner of the institution. They even had tools, loosened up their
196 machines in the machine shops, hid their tools and stuff.

Q. Did the prison officials ever search those shirt boxes?

A. Yes, you searched them.

Q. In 1931 and 1932?

A. You have to keep after them.

Q. Mr. Claudy, as far as you know, during those years did they systematically search those boxes?

A. Yes. Of course, you had to when the men were out of the shops.

I can't see why Cook had to hide his stuff, as long as it

was all stuff written about his case. I can't see why he didn't leave it on himself. Whether he had it taken off, or not—I know it wouldn't have been from any of the officers.

Q. No officer that you know of had any orders to take up any writings that a prisoner was writing out concerning legal papers?

A. Never was anything taken up like that. Only thing looked for was invisible ink.

Mr. Wall: That is all.

Recross Examination by Mr. Isham.

Q. You didn't have to take up the papers to de-
197 termine whether there was invisible ink?

A. Well, there is different ways to find out, it takes different ways of bringing it out.

Mr. Isham: That is all.

(And thereupon the witness was excused.)

Mr. Wall: The respondent rests.

(And here the respondent rested.)

The Court: Any rebuttal?

Mr. Isham: No rebuttal.

(And this was all of the evidence given in said cause.)

(The argument of counsel is omitted, a transcript of the argument not having been ordered.)

The Court: I will take this matter under advisement. Whatever my decision is, I will get in touch with counsel, so that whatever record you want to make you can make.

199 PETITIONER'S EXHIBIT 1.

County of ..... } ss:
State of Indiana.

H. D. Claudy, after being duly sworn, deposes and says that he resides in the aforesaid county and state.

Affiant further says that he was the Deputy Warden at the Indiana State Prison, located in LaPorte County, Michigan City, Indiana. For a long time prior to 1931, and some time thereafter.

Affiant further says that during the fall of 1931, exact date unknown to this affiant, an inmate one Lawrence E. Cook, came to his office with some legal papers, saying they were to be used in an appeal of his case. This affiant told him, the said Lawrence E. Cook, that he could not send out of the Prison any papers of a legal nature as it was against the established policy of the prison authorities.

Further this affiant sayeth not.

.....

Affiant.

Subscribed and sworn to before me a notary public this date ..... the .....

.....

Notary Public.

My Commission expires .....

201 PETITIONER'S EXHIBIT 2.

South Bend 16 Ind
March 25th 1945

Mrs. Floyed E. Cook,
Otterbein, Ind.

Dear Mrs. Cook:

Your two letters came to my home address yesterday. The reason I am with the Olive Corporation.

You will find papers and stamps in closed unsigned.

The reason I can not recall just what to place at that time.

There was rules at that time that for bid a inmate 202 to send out what ever the papers were.

But that is water over the dam now.

And after such a long time I would not think of signing any papers now.

Am very sorry but my mind would have to be clear as to what was said.

Sincerely Yours,
H. D. Claudy.

203 PETITIONER'S EXHIBIT 2-A.

(Envelope)

(Postmark South Bend Mar 25 2:30 PM 1945 Ind.)

1346 No. College St.,
South Bend 16, Ind.

Mrs. Floyd E. Cook
Otterbein
Indiana

Box 464

RESPONDENT'S EXHIBIT 1.

205 IN THE SUPREME COURT OF THE UNITED STATES.

.....Term.....

Lawrence E. Cook,
Petitioner,
vs.
The State of Indiana,
Respondent.
} Cause No. .....

Transcript of record from the Supreme Court of Indiana accompanying Petition for a Writ of Certiorari to the Supreme Court of Indiana from the United States Supreme Court.

Lawrence E. Cook,
P. O. Box 41,
Michigan City, Indiana,
By: Florence L. Cook,
Box 464,
Otterbein, Indiana.

Cleon Foust, Esq.,
Attorney General of Indiana,
State House,
Indianapolis, Indiana.

207 IN THE SUPREME COURT OF THE STATE OF INDIANA.

No. 28236.

Lawrence E. Cook,
Petitioner,
vs.
The State of Indiana,
Respondent.
} Original Action.

Be It Remembered, that on the 4th day of September, 1946 the following proceedings were had in said cause. Petition, Evidence, And Memo Brief For Allowance Of Appeal.

208 And afterwards, to-wit: On the 4th day of September, 1946, the same being the ..... judicial day of said May Term, 1946, the following proceedings were shad in said cause.

Come now the parties by counsel and the court, being advised in the premises gives leave to file this petition and respondent ordered to answer within 10 days.

Young,
J.

209 (Endorsement) Cause No. 28236. In the Indiana Supreme Court. Original Action. Lawrence E. Cook, Petitioner *vs.* The State of Indiana, Respondent. Petition, Evidence, And Memo Brief For Allowance Of Appeal. Filed: Original For Court. Lawrence E. Cook, Petitioner, P. O. Box 41, Michigan City, Indiana. Lasher & Simmons, By Elbert E. Lasher, Attorney for Petitioner, Wallace Bldg. Lafayette, Ind., Ph. 2170. Filed Sept. 4, 1946, Thomas C. Williams, Clerk.

210 IN THE SUPREME COURT OF INDIANA.

Original Action.

Lawrence E. Cook,
Petitioner,
vs.
The State of Indiana,
Respondent.
} Cause No. .....

PETITION FOR ALLOWANCE OF APPEAL.

Your petitioner, Lawrence E. Cook, respectfully presents to this court this his petition for allowance of an appeal to this court from the judgment of the Jennings Circuit Court in a certain cause in said court wherein your petitioner was defendant and the respondent, The State of Indiana, was plaintiff, and entitled, "The State of Indiana *vs.* Lawrence Cook, No. 2810" entered on the 23rd day of July 1931, for and on account of the reasons following, to-wit:—

1. That on the 23rd day of July 1931, petitioner was adjudged guilty of murder and sentenced to the Indiana State Prison for life by said Jennings County Indiana Circuit Court, predicated on the verdict of a jury previously returned into said court.

2. That on the 24th day of July 1931, petitioner was transported to and confined in said prison where he has since been and now is confined, except for short periods of time when he was removed on court order or for hospitalization.

3. That within thirty days after the return of said 211 verdict petitioner's trial counsel prepared and filed his written statutory motion for a new trial in and of said cause, which motion contained as grounds therefor, among others, "that the verdict is not sustained by sufficient evidence" and "that the verdict is contrary to law".

4. That said motion for new trial was overruled during the month of October 1931 by said trial court.

5. That within a few days subsequent to said ruling on said motion for a new trial petitioner's said trial counsel refused to perfect an appeal to this court from

said judgment, giving as their reason the fact that petitioner was and would be unable to pay or secure payment of their fee for such services. Petitioner inquired of the Court Reporter and was informed that a transcript of the evidence in said cause would cost between two hundred and two hundred fifty dollars, as the same appears by the affidavit of petitioner attached hereto, by this reference made a part hereof, and marked Exhibit A for identification.

6. That within six months from the overruling of said motion for new trial and within the time allowed by law for appealing in such cases and with the help of fellow prisoners petitioner prepared notices of appeal, praecipe for a complete transcript of record including all bills of exception containing a longhand manuscript of the shorthand notes of all evidence presented and the instructions given and refused, an assignment of error that said court erred in overruling said motion for new trial, and a
212 motion to appeal said judgment to this court as a poor person and without expense to petitioner, as the same appears by said Exhibit A.

7. That within six months after said ruling on said motion for new trial your petitioner gave said appeal documents to employees of said prison with request that they be mailed or otherwise delivered to this court, to the Clerk of said trial court, and the Prosecuting Attorney for said Jennings County, as the same appears by said Exhibit A, by the affidavit of one Dorsa Lindon, and by the signed statement of one Clyde Jones, attached hereto, by this reference made a part hereof, and marked Exhibits B and C, respectively, for identification.

8. That petitioner was informed by the duly appointed and legally acting Warden of said prison, Walter H. Daly, and other employees and prisoners of said prison that petitioner was not allowed to mail or otherwise send out said appeal documents; that petition was informed the rules of said prison forbid him from sending such documents out of said prison, as the same appears by said Exhibits A, B, and C.

9. That the rules of said prison enforced against your petitioner throughout his imprisonment therein during the latter part of the year of 1931 and during the entire year of 1932 and for a long time thereafter prohibited and prevented petitioner from sending said appeal documents out

of said prison, as appears by the certified copy of a letter written by Mr. Harry D. Claudy, the duly appointed and acting Deputy Warden of said prison during said
213 years of 1931 and 1932 and for a long time thereafter, to Mrs. Florence L. Cook, sister of petitioner, attached hereto, by this reference made a part hereof, and marked Exhibit D for identification. That petitioner has been informed and verily believes and on such belief avers that for many years last past said Warden, Walter H. Daly, has been and now is deceased.

10. That within six months subsequent to the overruling of said motion for new trial the sister of petitioner for and on behalf of petitioner made a trip from her home in Cincinnati, Ohio, to said prison, saw said Walter H. Daly, as Warden of said prison, asked him to deliver to her the said appeal documents for filing with the Clerk of said trial court and service on said Prosecuting Attorney or permit petitioner to mail or otherwise send out said documents and said Warden refused all of said requests, as the same appears by the affidavit of Mrs. Florence L. Cook, attached hereto, by this reference made a part hereof, and marked Exhibit E for identification.

11. That petitioner is innocent of the offense of which he has been convicted and he verily believes and on such belief avers that this court would have reversed said judgment of conviction if Indiana, acting by and through her said Warden of said prison, had not suppressed his efforts and prevented him from presenting said documents to said court and perfecting said appeal to this court. Your petitioner has never been guilty of, and has never before been charged with, a felony.

12. That by reason of said foregoing acts of In-
214 diana in suppressing, frustrating, and preventing petitioner in his efforts to perfect an appeal to this court from said judgment within the time allowed therefor by law petitioner has been and now is deprived of the equal protection and the due process of the law in violation of the Fourteenth Amendment to the Constitution of the United States of America and of Section 12, Article 1, and Section 1 and 4 of Article 7, and Article 3 of the Constitution of Indiana.

13. That the statutory time for perfecting said appeal has long since passed. That unless this court sustains his petition and permits petitioner to perfect said appeal he

cannot appeal and obtain relief from said judgment which he verily believes to be clearly contrary to law and clearly not sustained by sufficient evidence to establish all or any one of the material elements of the crime charged and that he will continue to suffer great injury and irreparable harm by reason thereof through no fault of his own in violation of said Fourteenth Amendment and said sections of the Indiana Constitution.

14. That in aid of the appellate powers and functions of this court it has both inherent and statutory power to entertain and sustain this petition to appeal after the time allowed by statute therefor has expired, under the conditions set forth herein.

Wherefore, petitioner respectfully prays the court for an order allowing him an appeal to this court from the judgment of the Jennings Circuit Court entered on
215 the 23rd day of July, 1931 in and by said court in a certain cause therein entitled, "The State of Indiana *vs.* Lawrence Cook, No. 2810," a reasonable amount of time within which to perfect said appeal, and an order to said court directing said court to examine and approve and allow petitioner to file all bills of exceptions necessary to fully and completely present said appeal to this court.

Petitioner further prays this court for an order ruling the respondent, The State of Indiana, to answer this petition within ten days from date such rule is issued herein or suffer judgment by default and for all further relief proper in the premises.

Respectfully submitted,

(Signed) Lawrence E. Cook,
Petitioner,

(Signed) Lasher & Simmons,
by Elbert E. Lasher,
Attorney for Petitioner.

State of Indiana, La Porte County. } ss:

Before me, the undersigned Notary Public, appeared Lawrence E. Cook and after having been duly sworn deposes and says that he has read and examined the above and foregoing petition subscribed by him and knows the contents thereof and verily believes them to be true.

(Signed) Lawrence E. Cook,
Affiant.

Subscribed and sworn to this 28th day of August A. D. 1946.

(Signed) Frank M. Swanson.
(Seal) *Notary Public.*

My Commission expires May 24, 1949.

216 Exhibit A.

State of Indiana, La Porte County. } ss:

Lawrence E. Cook, being first duly sworn deposes and says:—That he was the defendant in a certain cause in the Jennings County Indiana Circuit Court during the month of July 1931; that the State of Indiana was plaintiff in said cause; that said cause was numbered 2810; that he was sentenced to life in the Indiana State Prison by said court in said cause on the 23rd day of July 1931; that he was transported to and confined in said prison on the 24th day of July 1931, where he has since been and now is confined, except at such times when he was removed for short periods of time on court order or for hospitalization; that within thirty days after the return of the verdict of the jury in said cause his trial counsel filed a statutory motion for a new trial in said cause alleging as grounds therefor, among others, "that the verdict is not sustained by sufficient evidence" and "that the verdict is contrary to law"; that during the month of October 1931, said court overruled said motion; that within a few days after said ruling on said motion for new trial his trial counsel refused to perfect an appeal to the Indiana

Supreme Court from said judgment unless and until he paid them for such service; that he was without money or property with which to pay said counsel to perfect said appeal; that he inquired of the Official Court Reporter and was told that a transcript of the evidence in said trial would cost between two hundred and two hundred and
217 fifty dollars; that within six months after the overruling of said motion for new trial and with the assistance of fellow prisoners he prepared notices of appeal, praecipe for a complete transcript of record including all bills of exception containing a long hand manuscript of the shorthand notes of all evidence offered in said cause and the instructions given and refused, an assignment of error that said court erred in overruling said motion for a new trial, and a motion to appeal said judgment to said Supreme Court as a poor person; that within six months after the ruling on said motion for new trial affiant took said pleadings, last above referred to, to the hospital in said prison; that while waiting in a queue in said hospital along with many other prisoners the Warden of said prison, one Walter H. Daly, entered said hospital and, in the view, presence, and hearing of said queue of prisoners, affiant produced said last above mentioned documents to be used on appeal from said judgment to said Supreme Court and this affiant then and there stepped from said queue and asked said Warden for permission to mail said appeal papers to said Jennings Circuit Court and said Warden replied that it was against the rules of said prison to permit prisoners to send out papers to courts and that it was not allowed and that this affiant positively could not send out of said prison said appeal papers to any court or any person; that several employees and prisoners of said prison informed affiant that he could not send said appeal documents out of prison in substantially the same words used by said Warden; that during the time of his imprisonment in said prison in
218 the years of 1931 and 1932 and for a long time thereafter affiant was prevented from sending said appeal papers out of said prison; that affiant is innocent of the crime for which he was convicted; that by reason of said foregoing acts of said Warden in frustrating, suppressing, and preventing affiant from sending said appeal papers out of said prison, and through no fault of affiant, affiant was and has been prevented from sending said appeal

documents out of said prison and perfecting an appeal from said judgment to the Indiana Supreme Court; and, that affiant has suffered irreparable injury and great hardship as the result of said suppression and prevention of his efforts to perfect said appeal.

(Signed) Lawrence E. Cook,
Affiant.

Subscribed and sworn to this 28th day of August 1946.

(Signed) Frank M. Swanson,
Notary Public.

(Seal)

My Commission expires May 24, 1949.

219 Exhibit B.

State of Ohio, }
County of Hamilton. } ss.

Dorsa Lindon, having been first duly sworn deposes and says: That during the early fall of 1931, he saw Lawrence E. Cook step from a hospital line and ask Walter H. Daly, Warden of the Indiana State Prison, for permission to mail appeal papers to the courts and heard Walter H. Daly tell said Lawrence E. Cook that he could not mail said papers as it was not allowed.

Affiant further says that the general policy of said Warden was not to permit prisoners to mail any papers to courts.

(Signed) Dorsa Lindon,
Affiant.

Sworn to before me a Notary Public this date 26th of March, 1945.

(Signed) C. W. R. Jones,
Notary Public, Hamilton County, Ohio.

(Seal)

My Commission Expires August 3, 1946.

220 **Exhibit C.**

State of Indiana, } ss.
LaPorte County. }

Clyde Jones, first having been duly sworn deposes and says: That during the fall of 1931, he was standing in a line of prisoners in the hospital of the hospital in the Indiana State Prison near one Lawrence E. Cook when the warden, one Walter H. Daly, walked into said hospital.

Affiant further says that said Lawrence E. Cook stepped out of said hospital line and asked said warden, Walter H. Daly, if he, the said Lawrence E. Cook, could obtain said warden's permission to mail his appeal papers to court and said warden, Walter H. Daly, replied that it was against the prison rules to permit prisoners to send out papers to courts and that it was not allowed and that said Lawrence E. Cook could not send out said papers to any court.

(Signed) Clyde Jones,
Affiant.

Subscribed and sworn to before me this ..... day of 1945

(Seal) *Notary Public, LaPorte County, Ind.*

My Commission Expires .....

Received Aug 28, 1946 Warden's Office "O". 3:15.

221 **Exhibit D.**

County of ....., } ss.
State of Indiana. }

H. D. Claudy, after being duly sworn, deposes and says that he resides in the aforesaid county and state.

Affiant further says that he was the Deputy Warden at the Indiana State Prison, located in LaPorte County, Michigan City, Indiana. For a long time prior to 1931, and some time thereafter.

Affiant further says that during the fall of 1931, exact date unknown to this affiant, an inmate one Lawrence E. Cook, came to his office with some legal papers, saying they were to be used in an appeal of his case. This affiant told

him, the said Lawrence E. Cook, that he could not send out of the Prison any papers of a legal nature as it was against the established policy of the prison authorities.

Further this affiant sayeth not.

.....

Affiant.

Subscribed and sworn to before me a notary pblic this date ..... the .....

.....

Notary Public.

My Commission Expires .....

222

South Bend 16, Ind.
March 25th, 1945.

Mrs. Floyd E. Cook
Otterbein, Ind.

Dear Mrs. Cook:

Your two letters came to my home address yesterday.

The reason I am with the Oliver Corporation.

You will find papers and stamps inclosed unsigned.

The reason I cannot recall just what to place at that time.

There was rules at that time that for bid a inmate to send out whatever the papers were.

But that is water over the dam now. And after such a long time I would not think of signing any papers now.

Am very sorry but my mind would have to be clear as to what was said.

Sincerely yours,

H. D. Claudy.

State of Indiana, }
Tippecanoe County. }

I, Mrs. Floyd E. Cook of Otterbein, Indiana swear that the above letter is a true and correct copy of the original.

(Signed) Mrs. Floyd E. Cook.

Subscribed and sworn to before me this 11th day of April, 1945.

(Signed) Gynette Yerkes,

(Seal) *Notary Public.*

My Commission expires June 8, 1945.

223 **Exhibit E.**

State of Indiana, }
Tippecanoe County. } ss.

Mrs. Florence L. Cook nee Cook, being first duly sworn deposes and says:

That during the month of October, 1931 she made a trip from her home in Cincinnati, Ohio, to Michigan City, Indiana and to the Indiana State Prison for and on behalf of her brother, one Lawrence E. Cook, and talked to the Warden of said prison; that affiant asked said Warden, one Walter H. Daly, to permit her said brother to send out from said prison certain papers to perfect an appeal from the judgment of the Jennings County Indiana Circuit Court entered in a certain cause therein entitled The State of Indiana *vs.* Lawrence Cook, No. 2810, to the Indiana Supreme Court or permit affiant to receive and take said appeal papers to said Jennings Circuit Court for filing and perfection of said appeal; that said Warden refused to permit said Lawrence E. Cook to send said appeal papers out of said prison to this affiant at said time or permit affiant to receive said appeal papers and told affiant that the rules of said prison prohibited any prisoner from sending any appeal papers out of said prison to any court or person and that he, said Warden, would not, and he did not, permit affiant to receive said appeal papers which said Lawrence E. Cook had previously informed affiant he had prepared; that affiant verily believes that said Lawrence E. Cook did not have funds with which to compensate counsel to perfect said appeal; and, that trial counsel refused
224 to perfect said appeal unless and until they were compensated for such services.

(Signed) Mrs. Florence L. Cook,
nee Cook,
Affiant.

Subscribed and sworn to this 4th day of September, 1946.

(Signed) Margaret Freestone,
Notary Public.

(Seal)

My Commission Expires Jan. 14, 1947.

(Warden Stamp.) "Received Aug 28 1946 Warden's Office "O".

225 MEMORANDUM BRIEF.

Jurisdiction of the court to entertain the petition herein is supported by the following authorities:

"In aid of its appellate power and functions this court has both inherent and statutory power to entertain and determine a petition to appeal after the time allowed by statute therefore has expired, under the conditions set forth in paragraph one of appellant's complaint, Sec. 3-2201, Burns' 1933, but the LaPorte Circuit Court is without jurisdiction so to do in this action."

State ex rel. Cook v. *Howard,* Ind. 1945, 64 N. E. 2d 25, at page 27, Notes 4, 5.
State ex rel. Barnes v. *Howard,* Ind. 1946, 65 N. E. 2d 55, at page 56, Notes 4, 5.
Partlow v. *State,* 1924, 195 Ind. 164, 144 N. E. 661.
Warren v. *Indiana Telephone Co.,* 1940, 217 Ind. 93, 26 N. E. 2d 399.
Attica Building & Loan Ass'n of Attica v. *Colvert,* Ind. 1939, 23 N. E. 2d, at page 490, Notes 15, 17.

The appellant, Cook, referred to in the above quoted excerpt is now the petitioner herein. The above excerpt is from the opinion of this court in an appeal from the La Porte Circuit Court denying a petition for habeas corpus, paragraph one of which was substantially identical to and based on the identical suppression complained of in the petition herein.

226 The petition shows, conclusively we think, that petitioner was effectively prevented from perfecting an appeal to this court from the judgment of the Jennings Circuit Court under which he is now laboring within the time allowed by statute. We further submit that the petition clearly shows that petitioner was prevented from perfecting his appeal by the State of Indiana, acting through her Warden—that said action of the Warden is state action.

"A state acts by its legislative, its executive, or its judicial authorities. It can act in no other way. * * * Whoever, by virtue of public position under a state government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the law, violates the constitutional inhibitions; and as he acts in the name and

for the State, and is clothed with the State's power, his act is that of the State."

Ex parte Virginia, 100 U. S. 339, 25 L. Ed. 676.
Cochran v. *State of Kansas*, 1942, 316 U. S. 255, 62 S. Ct. 1068, 86 L. Ed. 1453.

In this case of *Cochran* v. *State of Kansas, supra*, the United States Supreme Court said:

"The State properly concedes that if the alleged facts pertaining to suppression of Cochran's appeal 'were disclosed as being true before the Supreme Court of Kansas, there would be no question but that there
227 was a violation of the equal protection clause of the Fourteenth Amendment.'"

The action by Indiana, as disclosed by the petition and the supporting documentary evidence, in suppressing, frustrating, and preventing petitioner from sending his appeal documents from said prison and perfecting said appeal, provided for by the laws of the Indiana (*State ex rel. White* v. *Hilgeman*, Judge, 1941, 218 Ind. 572, 34 N. E. 2d 129), deprived petitioner of the equal protection and the due process of law guaranteed to him by the Fourteenth Amendment to the Constitution of the United States of America and of Section 12, Article 1, and was repugnant to Sections 1 and 4 of Article 7, and Article 3 of the Indiana Constitution.

Cochran v. *State of Kansas*, 1942, 316 U. S. 255, 62 S. Ct. 1068.
Hawk v. *Olson*, 1946, 66 S. Ct. 116.

Wherefore, it is respectfully submitted that the petition should be granted as prayed.

Respectfully submitted,
(Signed) Lawrence E. Cook,
Petitioner,
(Signed) Lasher & Simmons,
By Elbert E. Lasher,
Attorney for Petitioner.

(Warden Stamp.) "Received Aug 28 1946 Warden's Office "O", 3:15."

228 And afterwards, to-wit: On the 13th day of September, 1946, the same being the ..... judicial day of said May Term, 1946, the following proceedings were had in said cause.

Comes now the respondent by counsel and files petition for an extension of time within which to file answer to the petition herein and for leave to file counter-affidavits, which petition is in the words and figures following, to-wit: (H. I.)

229 Endorsement: Cause No. 28236. In the Supreme Court of Indiana. Lawrence E. Cook, Petitioner *vs.* State of Indiana, Respondent. Petition for Extension of Time. James A. Emmert, Attorney General, Frank E. Coughlin, 1st Ass't Atty. Gen., George W. Hadley, Deputy Atty. Gen., Attorneys for Respondent. Filed September 13, 1946. Thomas C. Williams, Clerk, Supreme Court.

230 IN THE SUPREME COURT OF INDIANA.

Lawrence E. Cook, *Petitioner,*
vs.
State of Indiana, *Respondent.*
} Cause No. .....

RESPONDENT'S PETITION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE ANSWER TO THE PETITION HEREIN AND FOR LEAVE TO FILE COUNTER-AFFIDAVITS.

Respondent, the State of Indiana, respectfully shows to the court that the petitioner herein has filed a petition for allowance of appeal to this court from the judgment of the Jennings Circuit Court in a certain cause in said court wherein petitioner was defendant and the State of Indiana was plaintiff entitled "The State of Indiana *vs.* Lawrence E. Cook, No. 2810" entered on the 23rd day of July, 1931 wherein the defendant was adjudged guilty of murder and sentenced to the Indiana State Prison for life. Respond-

ent would further show that it has been ruled by the court to answer said petition on or before September 14, 1946. That petitioner alleges that he was suppressed and prevented from taking a timely appeal from said judgment by the refusal of the Warden and other employees of the Indiana State Prison wherein he was incarcerated, to allow him to mail or otherwise send out appeal documents which he had prepared. That petitioner has filed certain affidavits together with said petition of witnesses in
231 support of the allegations of his petition.

Respondent would further show that said petition raises a question of fact as to whether or not he was suppressed and prevented by state officials from taking a timely appeal from said judgment, a determination of which will be necessary to a proper adjudication of this cause.

Respondent would further show that in order to properly answer the petition herein, it would be necessary to investigate the facts alleged in said petition and to interview witnesses at Michigan City and at Jennings County, Indiana. That the work of preparing respondent's answer is under the exclusive charge of Frank E. Coughlin, First Assistant Attorney General; that for the past ten days and more, he has been engaged in other special work including the preparation of briefs and other matters before this court. That by reason of said facts and working with due diligence and giving preference to the preparation of respondent's answer in this cause, the time allowed by the rule of this court for answering petitioner's petition will not be reasonably sufficient to complete the same; that in the interests of justice, respondent represents to the court that it will require an extension of thirty (30) days beyond September 14, 1946 in which to prepare and file respondent's answer in the above entitled cause. That in as much as petitioner has filed affidavits in his petition containing statements of witnesses tending to support the allegations of fact in his petition, it will be necessary for the re-
232 spondent in order to answer said petition to file counter-affidavits with his answer if the facts, after investigation, justify the same.

Wherefore, respondent respectfully petitions this honor-

able court for an extension of time to and including the 14th day of October, 1946, in which to file an answer herein and further prays that leave by the court be granted respondent to file counter-affidavits containing statements of witnesses with said answer.

Respectfully submitted,

(Signed) James A. Emmert,
Attorney General,
Frank E. Coughlin,
1st Ass't. Atty. Gen.,
George W. Hadley,
Deputy Atty. Gen.,
Attorneys for Respondent.

Come now the parties by counsel and the court, being advised in the premises, grants a petition of time in which to file and answer, and time is extended to and including the 14th day of October, 1946.

233 (Endorsement): Original Cause No. 28236 In the Supreme Court of Indiana Lawrence E. Cook Petitioner *vs.* State of Indiana Respondent Answer Of The State To Plaintiff's Petition For Allowance Of Appeal Filed Oct 15 1946 Thomas C. Williams, Clerk. James A. Emmert, Attorney General of Indiana Frank E. Coughlin, First Assistant Attorney General George W. Hadley, Deputy Attorney General.

234 Exhibit I.

IN THE SUPREME COURT OF INDIANA.

Lawrence E. Cook, *Petitioner,*
vs.
State of Indiana, *Respondent.*
} Cause No.

ANSWER OF THE STATE TO PLAINTIFF'S PETITION FOR ALLOWANCE OF APPEAL.

The State of Indiana by James A. Emmert, Attorney General of Indiana, for its answer to the plaintiff's petition herein and to each separate rhetorical paragraph of said petition says:

1. It admits the allegations in rhetorical paragraph 1.
2. It admits the allegations in rhetorical paragraph 2.
3. It admits the allegations in rhetorical paragraph 3.
4. That the State does not have sufficient information to be able to either affirm or to deny the allegations contained in the 4th rhetorical paragraph.
5. That it denies so much of the allegations in rhetorical paragraph 5 which deals with the refusal of petitioner's trial counsel to perfect an appeal to this court from said judgment after petitioner's motion for new trial had been denied. In support hereof the state files its Exhibit I, affidavit of William T. Fitzgerald, one of the defendant's counsel at the time of the original trial. So much of
235 rhetorical paragraph 5 dealing with what the court reporter may have told the petitioner as to the cost of preparing the transcript, the State does not have sufficient information to be able to either affirm or deny this allegation.
6. The State does not have sufficient information to be able to affirm or deny the allegations contained in the 6th rhetorical paragraph.
7. That the State denies the allegations in rhetorical paragraph 7.
8. That the State denies the allegations in rhetorical paragraph 8.
9. That the State denies the allegations in rhetorical paragraph 9, except as to the death Walter H. Daly.

10. The State does not have sufficient information to be able to affirm or deny the allegations contained in rhetorical paragraph 10.

11. That the State denies the allegations in rhetorical paragraph 11.

12. That the State denies the allegations in rhetorical paragraph 12.

That the State in support of its denial of allegations 7, 8, 9, and 11 files herewith its Exhibit II, same being an affidavit by H. D. Claudy, Deputy warden of the Indiana State Prison, Michigan City, Indiana, during the period of September, 1931 to September, 1933.

13. That the State admits that part of rhetorical
236 paragraph 13 that states that the statutory time for perfecting an appeal has long since passed, but denies the remainder of rhetorical paragraph 13.

14. The State admits so much of that part of rhetorical paragraph 14 that states that this court has an inherent and statutory power to entertain plaintiff's petition, but denies that the petitioner is entitled to the relief prayed.

15. For further answer to plaintiff's petition for allowance of appeal the State files herewith its Exhibit III, an affidavit of Virginia James, the official court reporter of Jennings Circuit at the original trial of this petitioner.

16. For further answer the State states that on two other occasions this petitioner has been before the Supreme Court of the State of Indiana, one case dealing with writ of error coram nobis and the correction of records nunc pro tunc, and the other a mandamus proceeding dealing with petition for writ of error coram nobis, and in neither case did the petitioner raise the question he is now raising before this court. Said cases being:

Cook v. *State of Indiana* (1941, 219 Ind. 234.
State, ex rel. Cook v. *Wicken* (1943), 222 Ind. 383.

Wherefore, the defendant prays that petitioner's petition be denied.

(Signed) James A. Emmert,
Attorney General of Indiana.

(Signed) Frank E. Coughlin,
First Assistant Attorney General.

(Signed) George W. Hadley,
Deputy Attorney General.

237 State of Indiana, }
Vanderburgh County. } ss.

William T. Fitzgerald, being duly sworn upon his oath, says that he is a member of the Bar of the State of Indiana, and that he is now practicing law in the City of Evansville, Vanderburgh County, Indiana. That in the years of 1930 and 1931 he was a member of the bar of the State of Indiana and during those years was practicing law in the City of North Vernon, Jennings County, State of Indiana.

That in the month of July, 1931, he assisted in the defense of Lawrence E. Cook, who was charged with the first degree murder of his wife, the trial having been held in the Jennings Circuit Court, Vernon, Indiana. That Clem Huggins, an attorney in the City of Louisville, Kentucky, was chief counsel in said cause and that Clem Huggins is now deceased. That at the said trial, the jury, by their verdict, found Lawrence E. Cook guilty and that he should be imprisoned in the State Prison for life.

Your affiant says that at no time after the overruling of the motion for a new trial, did he or, to his knowledge, did Clem Huggins, refuse to perfect an appeal to the Supreme Court of Indiana from the judgment of the Jennings Circuit Court giving as the reason the fact that the defendant was and would be unable to pay or secure payment of the fees for such services. That your affiant did not refuse to perfect an appeal to the Supreme Court of Indiana from the said judgment unless or until Lawrence E. Cook paid him for such services and to affiant's knowledge, Clem
238 Huggins, who is now deceased, did not refuse to perfect an appeal to the Indiana Supreme Court from said judgment unless or until Lawrence E. Cook paid him for such services.

(Signed) William T. Fitzgerald.

Subscribed and sworn to by William T. Fitzgerald, before me, the undersigned Notary Public in and for said County and State, this 14th day of October, 1946.

(Signed) Marguerite Richter,
(Seal) *Notary Public.*

My Commission expires July 6, 1950.

239- Exhibit II.

State of Indiana }
County of St. Joseph } ss.

AFFIDAVIT.

H. D. Claudy, after being duly sworn, on his oath deposes and says:

That he resides in the aforesaid county and state.

Affiant further says that he was a deputy warden at the Indiana State Prison located in LaPorte County, at Michigan City, Indiana, for a long time prior to 1931, and sometime thereafter;

Affiant further says that at no time during his tenure of office as deputy warden was there ever a rule of the State Prison forbidding inmates to send to the courts legal papers; that it has been called to his attention that one Lawrence E. Cook, now an inmate of said penitentiary, has filed with the Supreme Court of the State of Indiana, a petition for allowance of appeal; that, among other things, he alleges that within six (6) months after his incarceration he prepared, with the assistance of other prisoners, an appeal to the Supreme Court of the State of Indiana, but owing to the rule within the institution, the said Lawrence E. Cook was prevented from mailing to the Clerk of the Supreme Court said appeal papers.

It has also been called to the attention of this affiant that the said Lawrence E. Cook further alleges that he came to the office of this affiant with legal papers, saying that they were to be used on an appeal of his case, and that this affiant is supposed to have told said Lawrence E. Cook that he could not send out of the prison any
240 papers of a legal nature, as it was against the established policy of the prison authorities. This affiant states that there was no such rule and that oftimes, to his personal knowledge and recollection, papers were mailed out to the various courts of the state and of the nation, and this oftimes occurred even though the prisoner or inmate did not have a lawyer.

This affiant denies that said Lawrence E. Cook came to him with legal papers, saying they were to be used for an appeal, and this affiant further denies that he ever told

said Lawrence E. Cook that he could not send out any legal papers from said prison.

Affiant further states that Walter H. Daly, the then warden of said institution, is now deceased. This affiant further states that, to his knowledge, at no time during his regime as deputy warden was there ever such a rule forbidding legal papers to be sent out by prisoners to the various courts, and that at no time, to his knowledge, did the said Warden, Walter H. Daly, ever forbid the mailing out of legal papers by inmates to the Court, nor did this affiant ever receive any order from the then warden, Walter H. Daly, ever to refuse the mailing of any legal papers, either to the Supreme Court of the State of Indiana or any other court, but, on the contrary, oftimes did permit, and at no time did he ever forbid, nor, to his knowledge, did any other official or employee of the then prison ever forbid, the mailing out of any legal papers to the Supreme Court of the State of Indiana or any other court.

Affiant further states that one Mrs. Floyd E. Cook
241 did write him in South Bend some time between 1939-1944 and requested of him to make a statement to the effect that said Lawrence Cook had been denied the privilege of mailing his papers to the Supreme Court, and that there was then a rule to that effect within the institution; that said affiant refused to make such a statement and, among other things, told her that a long time had transpired and that it was now water over the dam. Affiant further states that he neither told Mrs. Floyd E. Cook nor any other individual that there was then such a rule within the institution forbidding the mailing of papers to courts by inmates, whether said inmate had counsel or not, nor did he ever tell anyone that he forbade the said Lawrence E. Cook to mail appeal papers to the Supreme Court of Indiana.

Further affiant saith not.

(Signed) H. D. Claudy.

Subscribed and sworn to before me this 10 day of October, 1946.

(Signed) Mary Theresa Szalay,
(Seal) *Notary Public.*

My commission expires: February 20, 1949.

242 Exhibit III.

State of Indiana, } ss.
County of Jennings. }

Virginia James, being first duly sworn on her oath says that she was formerly the official court reporter of the Jennings Circuit Court and as such took the notes of the evidence in the case of State of Indiana *vs.* Lawrence Cook, in which case judgment was rendered on July 23, 1931.

She further states it is impossible for her to make a transcript of the evidence in said cause for the reason that from an examination of the notes on the evidence now available in the office of Judge of the Jennings Circuit Court it could not be determined whether or not all the notes of the evidence are there; and for the further reason the exhibits introduced in said cause are not available; and for the further reason that she is of the opinion she can no longer read the notes of said evidence accurately enough to make a transcript of the evidence to which she would be justified in making the usual certification.

(Signed) Virginia James.

Subscribed and sworn to before me this 22nd Day of August, 1946.

(Signed) Joseph W. Verbarg,
(Seal) *Notary Public.*

My Commission Expires January 1, 1949.

243 And afterwards, to-wit: On the 22nd day of October, 1946, the same being the ..... judicial day of said May Term, 1946, the following proceedings were had in said cause.

Comes now the petitioner by counsel and files petition for time within which to file reply to respondent's answer and for leave to file supporting affidavits, which petition is in the words and figures following, to-wit: (H.I.).

244 Endorsement: In the Supreme Court of Indiana. Lawrence E. Cook, Petitioner, *vs.* State of Indiana, Respondent. No. 28236. Petitioner's Petition For Time To File Reply. Lawrence E. Cook, P. O. Box 41, Michigan City, Indiana. Filed: October 22, 1946. Thomas C. Williams, Clerk Supreme Court.

245 IN THE SUPREME COURT OF INDIANA.

Lawrence E. Cook, *Petitioner,*
vs.
State of Indiana, *Respondent.*
} No. 28236.

PROOF OF SERVICE.

Received one copy of Petitioners Petition For Time To File Reply in the above entitled cause this ..... day of October 1946.

.....
Attorney General of Indiana.

By: .....

246 IN THE SUPREME COURT OF INDIANA.

Original Action.

Lawrence E. Cook,
Petitioner,
vs.
The State of Indiana,
Respondent.
} No. 28236.

PETITIONERS PETITION FOR TIME WITHIN WHICH TO FILE REPLY TO RESPONDENTS ANSWER AND FOR LEAVE TO FILE SUPPORTING AFFIDAVIT.

Petitioner, Lawrence E. Cook, respectfully shows to the court that he has filed herein his petition for allowance of appeal to this court from the judgment of the Jennings Circuit Court in a certain cause in said court wherein petitioner was defendant and the State of Indiana was plaintiff entitled "The State of Indiana *vs.* Lawrence Cook, No. 2810" entered on the 23rd day of July, 1931, wherein the defendant was adjudged guilty of murder and sentenced to the Indiana State Prison for life. That petitioner would further show that on the 17th day of October 1946 he received a copy of Respondent's answer to said petition with certain attached affidavits in support of said answer.

Petitioner would further show that said answer raises a question as to the general policy of said prison administration with reference to preparing and sending out papers on appeal to this and other courts of Indiana, a determination of which may be necessary to a proper
247 adjudication of this cause.

Petitioner would further show that in order to properly reply to said answer herein, it will be necessary to investigate the statements made herein with reference to said policy, obtain certain letters if now available, consult certain public records in one or more Circuit Courts of Indiana, and obtain certain affidavits regarding said policy.

Petitioner would further show that the distance required to be traveled in order to investigate and procure

evidence to fully present the facts germane to the issues herein and the number of witnesses required to be interrogated and working with due diligence and giving preference to the preparation of petitioner's reply in this cause he verily believes and on such belief avers that he will need thirty (30) days beyond the 22nd day of October 1946 to file said reply herein; that in so far as petitioner is advised no rule to reply has been issued herein by the court and he is unable to find an applicable rule among the present Rules of the Indiana Supreme Court 1943 Revision.

Wherefore, petitioner respectfully petitions this honorable court for time to and including the 22nd day of November 1946, in which to file a reply herein and further prays that leave by the court be granted petitioner to file counter-affidavits, statements, court records, letters, and other documentary evidence in support of and with
248 said reply.

Respectfully submitted,
(Signed) Lawrence E. Cook,
Petitioner.

Comes now the parties by counsel and the court, being advised in the premises, grants a petition for time in which to file reply to respondents answer and for leave to five supporting affidavit, and time is extended to and including the 22nd day of November, 1946.

249 And afterwards, to-wit: On the 22nd day of November, 1946, the same being the ..... judicial day of said May Term, 1946, the following proceedings were had in said cause.

Comes now the petitioner by counsel and files petition for time within which to file reply to respondent's answer and for leave to file supporting affidavits, which petition is in the words and figures following; to wit: (H.I.)

250 Endorsement: No. 28236. In the Supreme Court of Indiana. Lawrence E. Cook, Petitioner, *vs.* State of Indiana, Respondent. Petitioner's Petition For Time To File Reply. Lawrence E. Cook, P. O. Box 41, Michigan City, Ind. Filed: November 22, 1946. Thomas C. Williams, Clerk Supreme Court.

251 IN THE SUPREME COURT OF INDIANA.

Original Action.

Lawrence E. Cook,
Petitioner,
vs.
The State of Indiana,
Respondent.
} Cause No. 28236.

PETITIONER'S PETITION FOR TIME WITHIN WHICH TO FILE REPLY TO RESPONDENT'S ANSWER AND FOR LEAVE TO FILE SUPPORTING AFFIDAVITS.

Petitioner, Lawrence E. Cook, respectfully shows to the court that he has filed herein his petition for allowance of appeal to this court from the judgment of the Jennings Circuit Court in a certain cause in said court wherein petitioner was defendant and the State of Indiana was plaintiff entitled "The State of Indiana *vs.* Lawrence E. Cook, No. 2810" entered on the 23rd day of July 1931 wherein defendant was adjudged guilty of murder and sentenced to the Indiana State Prison for life.

That petitioner would further show that he has now ready his Reply to Respondent's Answer to Plaintiff's Petition For Allowance of Appeal for filing with the court with the exception that the now acting Warden of the Indiana State Prison has refused by letter under date of November 18, 1946, to have eleven affidavits and exhibits of inmates of the Indiana State Prison, signed and notarized.

That said Warden Howard has advised this petitioner
252 that only upon the request of this court will he call these men and have the affidavits notarized and signed. That petitioner does wish this court to consider these affidavits.

Wherefore, this petitioner most respectfully petitions this court for an extension of time beyond November 22, 1946 until this court can so request Warden Howard to have the affidavits completed.

Respectfully submitted,
(Signed) Lawrence E. Cook,
Petitioner,
By Mrs. (Floyd E.) Florence L. Cook,
Sister.

Come now the parties by counsel and the court, being advised in the premises, grants a petition for time within which to file reply to respondent's answer and for leave to file supporting affidavits, and time is extended to and including the 29th day of November, 1946.

And afterwards, to-wit: On the 25th day of November, 1946, the same being the 1st Judicial day of said November Term, 1946, the following proceedings were had in said cause.

Comes now the petitioner by counsel and files Petitioner's Reply to respondent's Answer to Plaintiff's petition for allowance of appeal, which reply is in the words and figures following, to-wit (H. I.):

253 IN THE SUPREME COURT OF INDIANA.

Original Action.

Lawrence E. Cook,
Petitioner,
vs.
The State of Indiana,
Respondent.
} No. 28236.

PETITIONER'S REPLY TO RESPONDENT'S ANSWER TO PLAINTIFF'S PETITION FOR ALLOWANCE OF APPEAL.

The petitioner, Lawrence E. Cook, for reply to respondent's answer to plaintiff's petition herein, says:

1. That said answer was filed on the 15th day of October 1946 and received by petitioner on the 17th day of October 1946. The time allowed by this court, as extended, for filing said answer expired on the 14th day of October 1946. Thus said answer was not filed within the time allowed by this court so to do nor was a copy thereof served on petitioner or his counsel within the time allowed by this court so to do and in conformity with Rule 2-13 of the 1943 Revision of the Rules of this court.

2. Replying to respondent's rhetorical paragraph 5,

petitioner says that trial counsel received some currency and a note secured by a mortgage on real property of petitioner's mother as compensation for their services in representing petitioner in said trial, which mortgage said counsel assigned and which was subsequently foreclosed at a time when petitioner and his mother were financially unable to pay said note and redeem said mortgage; that
254 on the day petitioner was sentenced said trial counsel stated that they would have to be paid before they would appeal said judgment to this court; that said trial counsel did not appeal said cause; that the records of the Jennings Circuit Court and of this court do not show that said counsel informed said courts of petitioner's financial condition and of his inability to pay for the records and services necessary to perfect an appeal to this court; that petitioner verily believes and on such belief avers that said counsel did not inform said courts of petitioner's financial condition. In support hereof petitioner files his Exhibits F a certified copy of said mortgage and assignment, G an original letter from counsel addressed to Florence L. Cook, sister of the petitioner and H an original letter from counsel addressed to Mrs. Rosa E. Cook, mother of the petitioner, I an affidavit of Wilbur Banister, acting sheriff at the time of petitioner's trial and sentence.

3. Replying to respondent's rhetorical paragraphs 7, 8, 9, and 11, petitioner would respectfully point out that he has averred in said petition that the Warden, Walter H. Daly, suppressed his efforts and prevented him from sending his appeal papers out of said prison to court; that petitioner has not charged the Deputy Warden, Harry D. Claudy, with these acts; that petitioner always believed and now believes that said Warden, and not said Deputy Warden, had final authority to speak for said prison with reference to sending said papers out of said prison;
255 that respondent's Exhibit II, the affidavit of Harry D. Claudy, does not show that said Warden did not suppress petitioner as averred in his petition but, on the contrary, shows that said Claudy does not know whether said Warden suppressed and prevented petitioner from sending out said papers; that said Warden told petitioner that there was a rule prohibiting petitioner from sending said papers to court; that the general policy of said prison administration during said time was to prevent the sending of petitions, papers, and legal documents to courts; and,

that notwithstanding said Claudy's denials of the existence of said rule in said Exhibit H, he did write a letter to the sister of petitioner in March 1945, same being Exhibit D of his petition, stating that there was such a rule applying to all inmates of said prison. A photostatic copy of this original letter from H. D. Claudy to Mrs. Floyd E. Cook, sister of petitioner is herein attached being marked Exhibit D1, D2, and D3, respectively. The D1 and D3, being an unsigned statement returned by H. D. Claudy and a photostatic copy of the envelope in which the original letter and unsigned statement were mailed from South Bend, Indiana, to Mrs. Floyd E. Cook, from the above mentioned H. D. Claudy. The originals now being in the possession of Mrs. Floyd E. Cook and an affidavit from the photographer stating that the original negatives now remain in his office and that the photostatic copies were made from the originals.

In support of petitioner's averment in the foregoing paragraph petitioner herewith files his Exhibits D1, 256 D2, and D3.

In further support of petitioner's averments in his rhetorical paragraph 3 above petitioner does further show by an affidavit of Russell W. Marks, an Officer serving under Warden W. H. Daly, in 1931 and right on through Warden Daly's term of appointment and that this Officer did also serve under the successor of Warden Daly and that such successor was Louis E. Kunkle. That during 1931 and in fact until Warden Louis E. Kunkle took office in 1933, inmates of the prison were not permitted to send out legal papers pertaining to their individual cases; that Warden W. H. Daly had rules against sending out legal papers which rules prohibited any officer to permit an inmate to send out papers and that further when Louis E. Kunkle became Warden of the Indiana State Prison in 1933 Officer Marks did serve under him and that the said Warden Kunkle did call the inmates to the Prison Chapel and did advise the inmates that they had his permission to send out any legal papers on their cases to any person or to any court they chose and that said Warden Kunkle did abolish the rule set up by the former Warden W. H. Daly who served in 1931 and until 1933. Such affidavit of Russell W. Marks herein being filed and marked Exhibit J.

In further support of petitioner's averments in his

rhetorical paragraph 3 above, petitioner does further file with this court his Exhibit K, being a certified full, true and complete transcript of the evidence of witness Louis E. Kunkle given in the trial of Merritt R. Longbrake
257 Petitioner *vs.* Alfred F. Dowd Warden Respondent #20689 in the LaPorte Circuit, which was tried on the 1st day of September 1944 before Judge Frank J. Conby, Judge, Petitioner does herein admit that there are some matters mentioned in this Exhibit K, that are of no interest to him but that part which states that Warden Louis E. Kunkle did call a meeting of the inmates immediately after becoming Warden, why he called the meeting and that he did tell the inmates they would henceforth be permitted to send legal papers out of the institution and that he did discuss the matter with his officers and that he did likewise instruct his officers that he was establishing a rule that legal papers could now be sent out by inmates from the prison, providing they were censored in the proper manner, is of very important interest to this petitioner and it seems only fair to all concerned that the entire testimony of Warden Louis E. Kunkle, at that time he speaks of be here set out. That further Mr. Kunkle was called by the State of Indiana to testify in this above mentioned case.

In further support of petitioner's averments in his rhetorical paragraph 3 above, petitioner has discussed the matter of what the prison policy of the prison was in 1931 and 1932 with regard to inmates sending legal papers from the prison during those years and that eleven different inmates of the prison have made affidavits, as herein filed and marked Exhibits L, M, N, O, P, Q, R, S, T, U, and V, and that these affidavits all state very clearly in different wording that inmates were not permitted to send or
258 mail out legal papers to any one or to any court regarding their cases.

In further support of petitioner's averments in his rhetorical paragraph 3 above, he says: that he has personally, carefully, and diligently searched the reports of this court during the eight year period beginning on the 1st day of June 1925 and ending on the 31st day of May 1922, same being the full time said Walter H. Daly was said Warden, and for a long time thereafter and, while he was unable to gain access to every report but only a great majority of said reports, petitioner has been unable to find one instance

wherein prisoners in said prison sent appeal papers from said prison to this court; and, that on inquiry petitioner has been unable to find one instance where prisoners in said prison sent papers and petitions from said prison to circuit, superior or criminal courts of Indiana or courts of the Nation during said period of eight years. On June 27, 1933 this court had before it an original action for an injunction to restrain said Walter H. Daly from unlawfully seizing and confiscating records and papers of a prisoner in said prison incident to said prisoner's efforts to file said papers in Indiana courts. The case was *Stephenson v. Daley, et al.*, Ind. 1933, 186 N. E. 300.

4. Replying to respondents rhetorical paragraphs 12, 13, and 14 petitioner says: that he verily believes and on such belief avers that a fair appraisal of the documentary evidence filed with the petition and this reply clearly
259 shows the truth of the averments of his petition therein referred to and his averments in this reply and he herein reaffirms those averments in the petition.

5. Replying to rhetorical paragraph 15 of respondent's answer to petitioner's petition, with reference to respondent's Exhibit III an affidavit of Virginia James, the official court reporter of Jennings Circuit Court at the original trial of this petitioner, petitioner says: that he admits every statement contained therein and believes the same to be true and on such belief and on the showing made by respondent in said answer and affidavit avers that it is now impossible and will be impossible to procure a longhand manuscript of the shorthand notes made and the originals or true copies of all exhibits introduced on the trial of and during the proceedings in said cause; that since the proceedings and trial of said cause was in actual progress for approximately sixty hours and due to the fifteen year lapse of time since said trial and the approximately thirty witnesses who testified, petitioner believes and on such belief avers that it is and will be impossible to agree on a bill of exceptions containing the evidence and exhibits received during the proceedings and trial of said cause; that since petitioner desires to question the sufficiency of the evidence to sustain the verdict, among other things

which were assigned as grounds in the motion for new trial filed within thirty days from the return of the verdict in said cause, it is necessary to have a complete bill of
260 exceptions and longhand manuscript containing all the evidence adduced during said proceedings and trial in order to perfect an appeal and present said questions to this court; that, in accordance with said affidavit of said official reporter, petitioner has lost his right to appeal through no fault of his; that unless said judgment of said Jennings Circuit Court is vacated he will continue to suffer great injury and irreparable harm by being deprived of his constitutional and statutory right to appeal said judgment, in violation of the Fourteenth Amendment to the United States Constitution and the decisions of the United States Supreme Court in the case of *Cochran* v. *State of Kansas*, 1942, 316 U. S. 255, 62 S. Ct. 1068, 86 L. Ed. 1453 and the decision of this court in the case of *Indianapolis Life Ins. Co.* v. *Lundquist*, 1944, 53 N. E. 2d 338.

6. Replying to respondent's rhetorical paragraph 16, petitioner says that the cases of *Cook* v. *State of Indiana*, 1941, 219 Ind. 234 and *State, ex rel. Cook* v. *Wickens*, 1943, 222 Ind. 383, referred to by respondent, show upon their face that they were not the kind of cases wherein the question here presented could be properly raised. Petitioner did present the question herein raised in the case of *State, ex rel. Cook* v. *Howard*, 1945, 64 N. E. 2d 25.

Wherefore, petitioner respectfully prays the Court for an order allowing him an appeal to this court from the judgment of the Jennings Circuit Court entered on the 23rd day of July 1931 in and by said court in a certain
261 cause therein entitled "The State of Indiana *vs.* Lawrence Cook, No. 2810," a reasonable amount of time within which to perfect said appeal, and an order to said court directing said court to examine and approve and allow petitioner to file all bills of exceptions necessary to fully and completely present said appeal to this court; or,

In the alternative, and on the showing made by respondent in his answer and said Exhibit III, petitioner respectfully prays the court for an order and judgment ordering and directing said Jennings Circuit Court to vacate, annul, and set aside said judgment entered on the 23rd day of July 1931 in and by said court in said cause therein entitled "The State of Indiana *vs.* Lawrence Cook, No. 2810," and further order and direct said court to grant

petitioner, Lawrence E. Cook a new trial in said cause and for all further relief which to this honorable court may seem proper in the premises.

Respectfully submitted,

(Signed) Lawrence E. Cook,
Petitioner,

By Mrs. (Floyd E.) Florence L. Cook,
Sister of Petitioner.

(Signed) Lasher & Simmons,
By Elbert E. Lasher,
Attorney for Petitioner.

262 Exhibit F.

Certified Copy of Mortgage.

This Indenture Witnesseth, That Rose Etta Cook of Jackson County, in the State of Indiana Mortgage And Warrant to Clem W. Huggins of Jefferson County, Kentucky and William T. Fitzgerald of Jennings County, in the State of Indiana, the following Real Estate, in Jackson County, in the State of Indiana, to-wit: The North half of the northeast quarter of the northeast quarter of section 1, township 6 north, range 6 east, containing 20 acres, more or less.

Also, the south half of the northeast quarter of the northeast quarter of Section 1, township 6 north, range 6 east, containing 20 acres, more or less.

Lots Nos. 12 and 13 in Block "B" in Homestead Addition to the City of Seymour, Indiana, to secure the payment, when it shall become due of one promissory note of even date in the amount of $1450.00 executed by Rosa Etta Cook to the above mortgagees payable one year from date with interest at the rate of 7 per cent per annum, said note providing for attorney's fees. Payable at the First National Bank of Vernon, Indiana, and the mortgagors expressly agrees to pay the sum of money above secured without relief from valuation laws; and upon failure to pay any one of said notes at maturity, then all of said notes are to be due and collectible and this mortgage may be foreclosed accordingly. And it is further expressly agreed that until all of said notes are paid, said mortgagor will keep all legal taxes and charges against said premises paid

as the same become due, and will keep the building thereon insured for the benefit of the mortgagee, as his interest may appear, to the amount of $1450.00 and failing to do so, said mortgagee may pay said taxes or insurance, and the amount so paid, with eight per cent interest thereon, shall be a part of said debt secured by this mortgage.

In Witness Whereof, The mortgagors has hereto set his hand and seal this 17th day of November, 1930.

Rosa Etta Cook. (Seal)

State of Indiana, } ss.
Jackson County. }

Before me, Wm. H. Burkley a Notary Public in and for said County, this 17th day of November, 1930, personally appeared Rosa Etta Cook, to me well known, acknowledged the execution of the annexes mortgage.

263

Witness my hand and notarial seal.

W. J. Burkley,
(Seal) *Notary Public.*

My commission expires March 4, 1934.

I certify that the mortgage of which the foregoing is a true copy was recorded the 18th day of November, 1930 at 8 A. M.

Effie McCormich,
R. J. C.

State of Indiana, } ss.
Jackson County. }

This is to certify that the above is a true and complete copy of Mortgage as found in the Mortgage Record No. 63, pages 159 & 160 of the records of my office.

Witness my hand and seal this 17th day of October, 1946.

(Signed) Thelma Alberring,
(Seal) *Recorder, Jackson County.*

My term expires December 31, 1946.

264 Certified Copy of Marginal Release.

"For value received I hereby acknowledge full payment and complete satisfaction of this mortgage, and release the same this 13 day of Aug. 1935.

Thos. E. Conner,
Clerk,
Ruth Humes,
Deputy.

Attest:
Lillian L. Lutes,
Recorder,
Jackson County,
Indiana.

State of Indiana, } ss:
County of Jackson. }

This is to certify that the above is a true and complete copy of a Marginal Release as found in Mortgage Record No. 63, on page 159, of the records of my office.

Witness my hand and seal this 17th day of October, 1946.

(Signed) Thelma Alberring,
(Seal) *Recorder Jackson County.*

My term expires December 31, 1946.

265 Certified Copy of Release of Mortgage.

This certifies that the certain mortgage of Rosa Etta Cook to Clem W. Huggins and William T. Fitzgerald which is recorded in the office of the Recorder of the Jackson County, Indiana, in Mortgage Record 63, page 159, has been fully paid and satisfied and the same is hereby released.

Witness the hand and seal of said mortgage William T. Fitzgerald, this 25th day of April, 1938.

Wm. Fitzgerald. (Seal)

State of Indiana, } ss:
Jackson County. }

Before me, the undersigned, a Notary Public in and for said County, this 25th day of April, 1938, came William T. Fitzgerald and acknowledged the execution of the annexed release of Mortgage.

In Witness Whereof, I have hereunto subscribed my name and affixed my official seal.

Coulter M. Montgomery,
(Seal) *Notary Public.*

My commission expires Jan. 2, 1941.

Witness the hand and seal of said mortgage Clem W. Huggins, this 25th day of April, 1938.

Clem W. Huggins. (Seal)

State of Indiana, } ss:
Jackson County. }

Before me, the undersigned, a Notary Public in and for said County, this 25th day of April, 1938, came Clem W. Huggins and acknowledged execution of the annexed release of mortgage.

In Witness Whereof, I have hereunto subscribed my name and affixed my official seal.

Coulter M. Montgomery,
(Seal) *Notary Public.*

My commission expires Jan. 2nd, 1941.

I certify that the release of which the foregoing is a true copy was recorded the 30th day of Aug., 1938 at 2:05 P. M.

Lillian L. Lutes,
R. J. C.

State of Indiana, } ss:
Jackson County. }

This is to certify that the above is a true and complete copy of a Written Release as found in Mortgage Record No. 70, page 188, of the records of my office.

266 Witness my hand and seal this 17th day of October, 1946.

Thelma Alberring,
(Seal) *Recorder Jackson County.*

My term expires December 31, 1946.

267 Exhibit G.

William T. Fitzgerald
Attorney & Counsellor at Law
North Vernon, Indiana.

January 5th, 1933.

Miss Florence L. Cook,
49 Burton Woods Place,
Cincinnati, Hio.

Dear Miss Cook:

I am writing you concerning the mortgage which is held by Mr. Huggins and myself. There has been no interest paid on the note since February 9th, 1932. We feel that the interest should be taken care of and at least some nominal sum taken care of on the principal.

There is also insurance premiums due in the amount of $20.75. The insurance should be taken care of when it falls due. We have paid the last three premiums.

Won't you please see if this matter cannot be taken care of and let me have remittance at your earliest convenience.

The balance due on the principal and note is $1,175.00.

Yours very truly,
(Signed) Wm. T. Fitzgerald.

WF/e

268 **Exhibit H.**

Clem W. Huggins
Attorney and Counsellor at Law
Inter-Southern Life Bldg.
Louisville, Ky.

August Twenty-second,
1933.

Mrs. Rosa Cook,
Homestead Avenue,
Seymour, Indiana.

My Dear Mrs. Cook:

I have been advised by Mr. William T. Fitzgerald that you are making very slow progress in the payment of your note for your fee and that the Bank in North Vernon is getting very tired of it.

Mr. Fitzgerald suggests and I join with him in the suggestion that you re-finance this obligation to the Federal Home Loan Bank, by which you can get the payments staved off for years at a very low interest rate making you a saving of considerable along that line. Mr. Fitzgerald assures me that he will help you to refinance the matter through the Federal Home Loan Bank.

I want to very earnestly suggest that you go to see him and talk the matter over with him and see if he cannot help you materially. I am sure that he can. Won't you attend to his matter promptly.

Thanking you, I am,

Very sincerely your friend,
(Signed) Clem W. Huggins.

269 **Exhibit I.**

State of Indiana, }
County of Jennings. } ss:

I, Wilbur Banister, living in the above named State and County do hereby depose and say that I was the acting Sheriff of Jennings County in the year of 1931. That I was the Sheriff of said County when Lawrence E. Cook, was placed on trial and convicted and that the day sentence was passed upon him his Counsel called on him, Lawrence E. Cook, at the jail of which I had charge and said Counsel told Lawrence E. Cook they would file motion for new trial and that if an appeal had to be taken they of course would have to be paid before starting the appeal. This affiant further says that Lawrence E. Cook was taken by me to the Indiana State Prison the day after he was sentenced in the Jennings Circuit Court.

(Signed) Wilbur Banister,
Affiant.

Subscribed and sworn to before me this 19th day of October 1946.

(Signed) Cecil G. Schuyler,
(Seal) *Notary Public.*

My Commission Expires Jan. 1st, 1949.

270 **Exhibit D-1.**

County of ....., }
State of Indiana. } ss.

H. D. Claudy, after being duly sworn, deposes and says that he resides in the aforesaid county and state.

Affiant further says that he was the Deputy Warden at the Indiana State Prison, located in LaPorte County, Michigan City, Indiana. For a long time prior to 1931, and sometime thereafter.

Affiant further says that during the fall of 1931, exact date unknown to this affiant, an inmate one Lawrence E. Cook, came to his office with some legal papers, saying they were to be used in an appeal of his case. This

affiant told him, the said Lawrence E. Cook, that he could not send out of the prison any papers of legal nature as it was against the established policy of the prison authorities. Further this affiant sayeth not.

.....

Affiant.

Subscribed and sworn to before me a notary public this date ..... the ....

My Commission Expires .....

.....

Notary Public.

271 Exhibit D-2.

South Bend 16, Ind.
March 25th, 1945.

Mrs. Floyed E. Cook,
Otterbein, Ind.

Dear Mrs. Cook:

Your two letters Came to my home Address Yesterday.
The reason I am With the Oliver Corporation.
You will find papers and Stamps in Closed unsigned.
The reason I can Not recall just what to place at that time.
There was rules at that time that for bid a inmate

II

to send Out what ever the papers were.
But that is Water over the dam now.
And after such a long time I would not think of signing any papers Now.
Am Very sorry but My Mind would have to be clear as to what was said.

Sincerely Yours.
H. D. Claudy

272 **Exhibit D-3.**

1346 No. College St.
South Bend 16, Ind.

(Cancellation Stamp)
South Bend
Mar 25
2:30 PM
1945
Ind.

Mrs. Floyd E. Cook
Otterbein,
Indiana

Box 464

273 **Certificate Regards D-2, D-3.**

County of Tippecanoe, }
State of Indiana. }

I, (signed) John W. Sauzey(?), a Photographer of Lafayette, Indiana in the above named County do hereby take oath that the here attached Photostatic copy of an original letter signed by one H. D. Claudy, is true and accurate and that this original letter and envelope were presented to me for a true copy by Mrs. Floyd E. Cook, also her given name being Florence of Otterbein, Indiana.

Further that this original letter and envelope are written with pen and ink on white unruled paper. That further the negatives of this photostatic are now on file in my office and it is the understanding that these are to remain in my files with a copy of this affidavit for any further reference any and all persons may wish to make.

(Signed) John W. Sauzey. (?)

Subscribed and sworn to before me a Notary Public this 23rd day of Oct., 1946.

(Signed) Paul K. Thompson,
(Seal) *Notary Public.*

My commission expires April 18, 1950.

274 **Exhibit J.**

County of LaPorte,
State of Indiana. }

I, (Signed) Russell W. Marks, do hereby depose and say that I am a resident of the above named County and State and that I was an Officer at the Indiana State Prison in the year of 1931 under Warden W. H. Daly.

That Warden W. H. Daly had rules set for the prison officials and the inmates which prohibited an inmate of the prison from mailing out or in any way sending out legal papers regarding their own case.

That when Louis E. Kunkle became Warden of the Indiana State Prison in 1935 this affiant worked under him and that he abolished this rule and that he further called all the inmates of the prison to the Chapel and told them they had his permission to send out any legal papers on their cases to any person or to any Court they chose.

(Signed) Russell W. Marks,
Affiant.

Subscribed and sworn to before me this 26th day of October, 1946.

(Signed) James P. Gleason,
(Seal) *Notary Public.*

My Commission Expires Dec. 4, 1946.

275 **Exhibit K.**

Louis E. Kunkel called as a witness in the case of Merritt R. Longbrake, Petitioner *vs.* Alfred F. Dowd, Warden, Respondent, #20689 in the LaPorte Circuit Court, being first duly sworn testified as follows:

Direct Examination by Mr. Jones.

Q. You may state your name to the court, please.
A. Louis E. Kunkel.
Q. Where do you reside Mr. Kunkel?
A. Michigan City, Indiana.
Q. And what is your profession or business?
A. Lawyer.

Q. And do you practice your profession in Michigan City, Indiana, at this time?

A. Yes.

Q. How long have you been a lawyer?

A. Since 1907.

Q. And were you formerly warden for the State of Indiana for the prison at Michigan City?

A. Yes, I was.

Q. During what period of time?

A. June 1933 to May 1938.

Q. Continuously?

A. Yes.

Q. And you were then of course, warden during the period including March and April 1935 were you not?

A. Yes, I was.

Q. At the time of your appointment and you taking
276 over the duties as warden to prison policy reference to forwarding mail outside of the prison?

A. Yes, I did.

Q. And what did you do if anything regarding the establishing of a policy at the time of your appointment or immediately thereafter with reference to such matters?

A. Well, I first tried to familiarize myself with what was the prison policy at the time I took office. When you use the word policy, I must say that there isn't any such thing as policy. It is the rule that's in force for the time being. I found that there was complaint that inmates could not send out papers to courts through which papers they sought to get their freedom. On investigation I found that the complaint by the inmates was false—wasn't true. However, to crystalize the whole affair I called a meeting of the inmates.

Q. When was this reference to the time you took over your duties as warden?

A. In 1933. I called a meeting and had all the inmates meet in the chapel except those who were ill or insane and in confinement, or some other reason couldn't be there promulgated the rule that any inmate of the prison would be permitted to use any means to effect his release from the prison, and I talked the matter over with the other officers of the institution and it was the rule during all the time I was there from 1933 to 1938 that any letter, any
277 paper, any writing that any inmate desired to send to any court, any lawyer or any person could be sent out by the inmate as a special letter at any time.

Q. I believe you said that you talked that matter over with your officers there?

A. That's right.

Q. I will ask you whether or not your instruction to your officers were to carry out the rule that you have just now said you adopted?

A. I would say that they were carried out entirely so with one exception, that any letters that contained scurrilous matter was to be brought to my attention—something defamatory of a judge or prosecutor or myself as warden, or the governor or the supreme court—that would have to be deleted and I would personally mark the part to be deleted, send it back to the inmate and have it rewritten, then it could go.

Q. In that connection was every letter or piece of mail offered by the prisoners sent outside of the prison censored by your office or someone under you?

A. Someone under me—not all of it by me.

Q. Tell the court just the procedure by which this censorship was conducted?

A. The routine was that the letter would be sent to the deputy's office and as a general rule at that time it went from the deputy's office to the mail room and there it was censored or stamped that it came through general channels, then sent to my office, and as I remember, most
278 mail had a stamp, and however it was not always so stamped a deputy would bring some special letters to me without having gone through the mail room.

Q. Do you remember the petitioner Merrit R. Longbrake?

A. I remember about him very well.

Q. You heard him testify as to the date he was committed to the Indiana State Prison. Let me ask you if that is your recollection as to the date which I think was about March 13th, 1935?

A. I know he was there in 1935 but I don't have any definite knowledge of my own outside of the records as to when he came.

Q. If he was committed to the prison, confined in March 1935, would you be able to tell the court what routine had to be followed and was followed with the prisoner of his character who would be committed to your institution at that time? What routine would be followed immediately after his arrival?

A. He would be checked in, given a number and placed in quarantine.

Q. And how long a period of time would that consume?

A. That was never definite, varied from ten days to two weeks.

Q. You did do that with every prisoner at that time?

A. It was done. I personally didn't do it.

Q. The practice was to do that with every prisoner committed, at that time?

A. Yes.

279 Q. This period of time would vary, you say, from ten days to two weeks?

A. Yes, it would.

Q. Where would the prisoner be confined during that period of time, whatever the period amounted to?

A. They had a quarrantine place back of the deputy's office.

Q. Would he be in communication with other prisoners during that period of time?

A. No.

Q. Was Mr. Longbrake in communication with any other prisoners during the period of his quarrantine of March 1935?

A. I could not say. That I do not know.

Q. Did you ever receive the letter purporting to come from Mr. Longbrake to your office during March or first of April 1935?

A. Yes, that letter was exhibited to me this morning here.

Q. Did you receive such a letter while you were warden?

A. No, I did not.

Q. Now Mr. Kunkel I hand you Petitioner's Exhibit Number 1, and ask you to look at the words and figures thereon and inviting your particular attention to words written as follows: "Not allowed" and some signature purporting to follow thereunder in pencil marks, and ask you to state whether or not that is your writing? (Exhibit 1 handed to witness.)

A. That is not my writing.

Q. I will ask you whether or not the signature purporting to exist thereon is your signature?

280 A. It is not.

Q. Did you ever during the period while you were warden of the Indiana State Prison have that letter or

such a letter before you in your official capacity as warden of the Indiana State Prison?

A. I did not.

Mr. Jones: You may cross-examine.

Cross-Examination by Mr. Gleason.

Q. Do you recall any particular legal papers that he did send out?

A. I don't think he ever sent any.

Q. Now you say the mail was handled outside your office, and if it was objectionable the censor's stamp was put on it?

A. No, it was put on whether it was objectionable or otherwise.

Q. What became of it then?

A. Some of it came to me, some of it went somewhere else, to show it went out of the institution legitimately.

Q. A letter censored, would that go to you or someone else?

A. That depended on whom it was meant for.

Q. If it was meant for you—

A. Oftentimes.

Q. —would it come to you personally?

A. Yes.

Q. If you were absent from the institution for a day or two days or a week or a month, would it wait for you to come back?

A. No. I had a deputy at that time.

281 Q. Who was it?

A. When I first came there and made the rule, Claudy was deputy. When Longbrake was there Mr. Samuel was deputy.

Q. You had a secretary too?

A. Yes.

Q. Did your secretary ever sign your name to documents?

A. To some, but those were letters as far as I know, and if so I presume she also added her initials.

Q. Do you know that for sure?

A. I don't know anything to the contrary.

Q. I think you said the prisoners in quarrantine were not handled by you personally?

A. Oh, no.

Q. How closely this man was confined in quarrantine you wouldn't know?

A. Personally I wouldn't know, Mr. Gleason.

Q. As far as this letter is concerned, you personally would not have suppressed it—is that correct, the Petitioner's Exhibit 1?

A. No, I see no reason for suppressing it.

Q. You couldn't say positively it was not suppressed by someone else, could you?

A. Well, with almost absolute positiveness I could say it was not suppressed by anyone.

Q. For example, had you been out of town at that time it could have been?

A. Oh, yes. That's speculative tho. It is contrary
282 to order and I don't recognize the signature.

Q. Were you ever asked to suppress these petitions by the attorney general's office or parole board or anyone while you were warden?

A. Yes.

Q. By whom?

A. By Mr. Klinger, head of the Parole Board, and the Welfare Department during Mr. Townsend's term.

Q. That took place after 1936?

A. Yes, sir.

Q. Mr. Kunkle do you remember an inmate out there named Raymond Mosely?

A. Very well.

Q. Did you ever suppress any of his papers?

A. What type of papers?

Q. Any at all.

A. I certainly did.

Q. Did those contain sucurrulous matter?

A. They certainly did.

Q. What was the nature of that?

A. I don't recall. He was calling everybody connected with the institution myself, the board members, the governor, names, belittling them.

Q. There were charges the effect that someone connected with the institution misappropriated a lot of money?

A. That I don't remember. What money?

Q. That was the nature of the charge?

283 A. No, sir, I never heard of it.

Mr. Gleason: That's all.

Redirect Examination by Mr. Jones.

Q. Did you suppress any legal papers sought by the prisoner mentioned to be sent out?

A. This man Longbrake?

Q. No, Mosley.

A. No.

Q. Did you suppress any legal papers to be sent out by him at any time?

A. No.

Q. In regard to the matter brought up by Mr. Klinger of the Welfare Department, did you state your attitude on that?

A. Yes. I discussed the matter and I still sent the papers out.

Q. You mean to say your attitude was that prisoners ough to be permitted to send papers out?

A. Any legal, legitimate paper to get release was permitted. It didn't make any difference how many papers they wanted to send or when, and it didn't matter how many lawyers they wanted to come see them. They could come see them. That's always been the rule out there, before me, after me and while I was there.

Mr. Jones: That's all.

Recross Examination by Mr. Gleason.

Q. How many inmates did you have out there at that time?

A. Two Thousand to Twenty-six Hundred, during that period.

284 Q. As far as your memory goes you can't remember any individual papers of his?

A. I remember, I am sure, that I didn't get any from him. My attention was directed very clearly to Mr. Longbrake, and I had my eye on Mr. Longbrake all the time I was there. He tried to make escapes that brought his name to my attention. I went down south of Burbon where his people lived and got his history. I remember Longbrake. He has a peculiar name and his record is peculiar. Longbrake was in my mind always, and I know I never saw any papers. It is true I went there in the fall of 1935, down south of Burbon and heard about him, but had I gotten any

papers in March '35 I would have remembered it surely in the Fall of 1935.

Q. Because of his bad reputation would his papers have been suppressed?

A. No. I didn't know his reputation in March. I learned that in the fall of 1935 after he tried to escape in August 1935—and again he tried to escape in 1936.

Q. Do you know how his record has been since?

A. Oh, no. I wouldn't know that.

Mr. Gleason: That's all Mr. Kunkel.

State of Indiana, } ss.
LaPorte County. }

I, Georgia H. Line do hereby certify that the above and foregoing is a full, true and complete transcript of the
285 evidence of witness Louis E. Kunkel given in the trial of Merritt R. Longbrake, Petitioner *vs.* Alfred F. Dowd, Warden, Respondent, #20689 in the LaPorte Circuit, which was tried on the 1st day of September, 1944, before Judge Frank J. Conboy, Judge.

Georgia H. Line.

Subscribed and sworn to before me this 16 day of Nov. 1946.

(Seal)

Clayton L. Rhoade,
Clerk of the LaPorte Circuit Court.
By Mabel Frens,
Deputy.

286 Exhibit L.

State of Indiana } ss.
LaPorte County }

Ernest Payton first being duly sworn deposes and says: That he knows the policy of the Indiana State Prison administration with reference to prisoners sending petitions, papers, and appeal documents out of said prison to courts in the year of 1930 and 1931; and, that said policy was that prisoners of said prison were not permitted to send said papers out of said prison to the courts of Indiana and the Nation.

Ernest Payton,
Affiant.

Subscribed and sworn to this 23 day of November, 1946.

Frank M. Swanson,
(Seal) *Notary Public.*

My commission expires May 24, 1949.

287 Exhibit M.

State of Indiana } ss.
La Porte County }

Edward Lee being first duly sworn deposes and says: That he was a prisoner in the Indiana State Prison during the year of 1930 and part of the year 1931 and that he knows the policy of said prison administration with reference to prisoners sending legal documents out of said prison to the court of Indiana; that said policy was that prisoners were not permitted to send said papers out of said prison.

Edward Lee,
Affiant.

Subscribed and sworn to this 23 day of November 1946.

Frank M. Swanson,
(Seal) *Notary Public.*

My commission Expires May 24, 1949.

288 Exhibit N.

State of Indiana }
La Porte County } ss.

Raymond L. Mosely being duly sworn deposes and says: That he was a prisoner in the Indiana State Prison all during the years of 1930, 1931, 1932; that he still is a prisoner in said prison; that he is familiar with the policy of said prison administration with reference to prisoners preparing and sending out appeal and other legal documents from said prison to courts of Indiana and of the United States during said years; that said policy was that prisoners were not permitted to send said papers out of said prison to said courts; that this affiant never saw a written rule to said effect but he was informed by the then Warden, one Walter H. Daly, that it was against the rules of said prison to prepare and send out legal papers to said courts.

Affiant further says that on one occasion during the aforesaid years he was typing a petition for a writ of habeas corpus ~~*which he intended to smuggle try to smuggle to a Federal Court*~~ when said Warden walked up behind and tapped affiant on the shoulder and asked what affiant was doing; that affiant replied he was trying to get out of prison; that said Warden inquired if affiant had a trial and a lawyer at the time of trial; that affiant replied in the affirmative; ~~*that said Warden then told affiant to tear up the paper upon which affiant was typing said petition;*~~ that said Warden told affiant that affiant could not prepare or send said petition out of said prison as it was against the rules.

R. L. Mosely,
Affiant.

Subscribed and sworn to this 23 day of November 1946.

Frank M. Swanson,
(Seal) *Notary Public.*

My Commission expires May 24, 1949.

Note: (In ink) I, R. L. Mosely, have personally deleted the 3 lines of 2nd Paragraph above.

289 Exhibit O.

State of Indiana } ss.
La Porte County }

Comes now Ford Godbold and being first duly sworn deposes and says: That he was a prisoner in the Indiana State Prison during a part of the year 1932 and knows the general policy of said prison administration with reference to preparing and sending out legal papers for filing in the courts during said time; that said policy was that prisoners could not and were not permitted to send out said papers to the courts; that affiant has heard many prisoners express resentment toward said policy.

Ford R. Goldbold,
Affiant.

Subscribed and sworn to this 23 day of November, 1946.

Frank M. Swanson,
(Seal) *Notary Public.*

My commission Expires May 24, 1949.

290 Exhibit P.

State of Indiana } ss.
La Porte County }

William Brown first having been duly sworn on his oath deposes and says that during the last half of the year 1931 and the first half of the year 1932 he was in the Indiana State Prison and knows the policy of the then prison administration with reference to sending out appeal and other legal papers to courts of Indiana and that said policy was that prisoners could not send such papers out to said courts.

William O. Brown,
Affiant.

Subscribed and sworn to this 23 day of November, 1946.

Frank M. Swanson,
(Seal) *Notary Public.*

My commission expires May 24, 1949.

291 **Exhibit Q.**

State of Indiana } ss.
La Porte County }

AFFIDAVIT.

First having been duly sworn, Donald Joseph deposes and says, that he was confined as a prisoner in the Indiana State Prison during the entire year of 1931; that he has knowledge of the general policy of the officials of said prison during said year of 1931 regarding the preparing, mailing, and filing of all legal papers; that said officials in said year of 1931 prohibited the preparation of any legal papers by the inmates of said prison; that said officials refused to mail, or otherwise send out, any legal papers prepared by the inmates of said prison during the said year of 1931, that said officials during said year placed all possible obstacles in the path of any inmate who tried to prepare any legal papers, that said officials considered all such legal papers as contraband and frequently confiscated said papers.

This affiant further says that in his presence and hearing one inmate named John Goodman approached the then acting Warden, Walter Daly, and respectfully requested said Daly to mail out some legal papers; that said Daly became violently abusive, that said Daly finally struck said inmate with his fist; that said inmate had offended said Daly only by requesting said Daly to forward said legal papers to some court; that said Goodman informed this affiant that the only way any inmate of said prison, during said 1931, could get any legal papers before a court was by smuggling them out of prison without said prison officials knowing about them; that this affiant verily believes that said Goodman was telling the truth with regard to Goodman's inability to obtain permission from said prison officials to send legal documents out of said prison to any court during said year of 1931.

Donald Joseph,
Affiant.

Subscribed and sworn to before me, a Notary Public, this 23 day of November 1946.

Frank M. Swanson,
(Seal) *Notary Public.*

My commission expires May 24, 1949.

292 Exhibit R.

State of Indiana
County of La Porte } ss.

AFFIDAVIT.

Paul Pierce, first having been duly sworn, deposes and says: That he was an inmate and confined in the Indiana State Prison throughout the entire year of 1931 and for a long time thereafter; that, as a result of his imprisonment, he had full knowledge of the rules and general policies in effect at said prison during the said year of 1931; that the general policy of the officials of said prison during said year of 1931 was to refuse to mail out any legal papers of any nature whatsoever for all inmates of said prison who were without funds or counsel; that officials of said prison forbade all inmates to prepare any kind of legal petition, writ, appeal, or any other kind of legal papers; that said officials frequently confiscated legal papers from the inmates of said prison during the said year of 1931; that said prison officials so gravely resented any inmate's preparing of legal papers that they sometimes placed those inmates who were detected in preparing such papers in solitary confinement for preparing same; that the general policy of said prison was to discourage all inmates who attempted to file any kind of petition or other legal paper; that the inmates of said prison during said year of 1931 were not freely permitted to prepare or mail out any kind of legal papers.

Paul Pierce,
Affiant.

Subscribed and sworn to before me, a Notary Public, this 23 day of November A. D., 1946.

Frank M. Swanson,
(Seal) *Notary Public.*

My commission expires May 24, 1949.

293 **Exhibit S.**

State of Indiana }
La Porte County } ss.

James E. S. Wood first having been duly sworn deposes and says: That during the year 1931 he was in the hospital of and in the Indiana State Prison standing near one Lawrence E. Cook when the Warden of said prison, one Walter H. Daly walked into said hospital; that said Lawrence E. Cook asked said Warden for permission to send his appeal papers to court; that said Warden replied that said Lawrence E. Cook could not send said appeal papers out of said prison; that it was against the rules of said prison to send said papers to court and that said Warden would not allow said papers sent out of said prison.

Affiant further says that during said year and for a long time thereafter the policy of said prison administration in said prison was that prisoners could not send appeal papers out of said prison to courts; that it was general knowledge among the prisoners of said prison that the policy of said prison was as aforesaid and not otherwise with reference to sending out said papers to all courts, both state and national.

Jas. E. S. Wood,
Affiant.

Subscribed and sworn to this 23 day of November, 1946.

Frank M. Swanson,
(Seal) *Notary Public.*

My commission expires May 24, 1949.

294 Exhibit T.

State of Indiana
La Porte County } ss.

George W. Larrison first having been duly sworn deposes and says: That he knows what the policy of the administration of the Indiana State Prison was with reference to prisoners sending out legal papers and appeal documents to the courts during the years 1931 and 1932 and for a long time thereafter; that said policy was that prisoners could not send said papers out of said prison to courts.

George W. Larrison,
Affiant.

Subscribed and sworn to this 23 day of November, 1946.

Frank M. Swanson,
(Seal) *Notary Public.*

My commission expires May 24, 1949.

295 Exhibit U.

State of Indiana
La Porte County } ss.

Noah Burris being first duly sworn deposes and says: That he is now a prisoner in the Indiana State Prison and that he has been incarcerated continuously for more than thirty-five years; that he knows the policy of said prison with reference to prisoners sending papers to courts during the years of 1931 and 1932; that said policy was that prisoners were not permitted to send legal documents to courts during said years and for a long time thereafter.

Noah Burris,
Affiant.

Subscribed and sworn to before me this 23 day of November, 1946.

Frank M. Swanson,
(Seal) *Notary Public.*

My commission expires May 24, 1949.

296 Exhibit V.

State of Indiana }
La Porte County } ss.

Frank Mears being duly sworn on oath deposes and says: That during the years 1931, 1932, and for a long time after he was a prisoner in the Indiana State Prison and knows what the policy of said prison administration was with reference to courts of the state of Indiana; that said policy was that prisoners could not send said papers out of said prison; that said policy was rigidly enforced.

Frank Mears,
Affiant.

Subscribed and sworn to this 23 day of November, 1946.

Frank M. Swanson,
(Seal) *Notary Public.*

My commission expires May 24, 1949.

297 On the 27th day of November, 1946, being the 3rd Judicial day of said November term, 1946.

In the Case of
Lawrence E. Cook
vs.
State of Indiana } Original Action.
No. 28236.

Comes now the parties by their attorneys and the Court being sufficiently advised in the premises gives orders as follows pronounced by Frank E. Gilkison, C.J.

298 IN THE SUPREME COURT OF INDIANA.

Lawrence E. Cook
vs.
State of Indiana. } No. 28236.

ORDER.

The petitioner having filed herein his verified petition for permission to appeal from a certain judgment rendered by the Jennings Circuit Court in the case of State of Indiana *vs.* Lawrence E. Cook, No. 2810 entered on the 23rd day of July, 1931, which said petition is supported by the affidavits of Lawrence E. Cook, Dora Linden, Florence L. Cook and Clyde Jones; and the State of Indiana having filed answer to said petition and the affidavits of William T. Fitzgerald, H. D. Claudy and Virginia Jaimes in opposition to same, to which answer petitioner has filed reply supported by the affdavits of Russell W. Marks, Georgia H. Line, Ernest Payton, Edward Lee, R. L. Mosely, Ford Godbold, Williams Brown, Donald Joseph, Paul Pierce, James E. S. Wood, George W. Larrison, Noah Burris and Frank Means, said cause is now submitted upon the said verified petition, the affidavits in support thereof, the answer and counter affidavits, and petitioner's reply and affidavits in support thereof.

The court having examined and considered said petition, the answer thereto, and petitioners reply and all of said affidavits and being duly advised in the premises,

299 finds that the basic allegation of said petition to-wit: that petitioner's counsel refused, without pay, to take an appeal is not true; and that petitioner is entitled to no relief herein.

It Is, Therefore, Considered And Ordered, that said petition be and it is hereby denied.

Dated this 26th day of November, 1946.

(Signed.) Frank E. Gilkison,
Chief Justice.

Filed Nov. 27-1946.

Thomas C. Williams,
Clerk.

300 (Endorsement) No. 28236. In the Supreme Court of Indiana. Lawrence E. Cook, Petitioner *vs.* The State of Indiana, Respondent. Petitioner's Motion for Rehearing. Filed. Lawrence E. Cook, P. O. B. 41, Michigan City, Indiana. Filed Dec. 16, 1946. Thomas C. Williams, Clerk. Elbert E. Lasher, Attorney for Petitioner.

301 IN THE SUPREME COURT OF INDIANA.

Original Action.

Lawrence E. Cook,
Petitioner,
vs.
The State of Indiana,
Respondent.
No. 28236.

MOTION FOR REHEARING.

The petitioner respectfully petitions the court for a rehearing herein for each of the following reasons:

1. The court erred in finding that the basic allegation of petitioner's petition was that petitioner's counsel refused, without pay, to take an appeal.

2. The court erred in overlooking and failing to give due consideration to the basic allegation in said petition as evidenced on the face thereof in rhetorical paragraphs 6, 7, 8, 9, 10, 11, 12, 13, and 14, and in exhibits A, B, C, D, and E, attached to and made a part thereof and as further evidenced on the face of respondent's reply and in exhibit II attached to and made a part thereof and as further evidenced on the face of petitioner's reply thereto in rhetorical paragraphs 3, 4, and 5 and in exhibits I, D-1, D-2, D-3, J, K, L, M, N, O, P, Q, R, S, T, U, and V, attached to and made a part thereof to-wit: that petitioner was frustrated, suppressed, and prevented from sending his appeal documents out of the Indiana State Prison, wherein petitioner was confined, to the Jennings Circuit Court and to this court by Indiana acting by and
302 through her Warden, Walter H. Daly, of said prison; thereby depriving petitioner of his Indiana Constitutional (Article I, Section 12, *Warren* v. *Indiana Telephone Co.*, 1940, 217 Ind. 93, 26 N. E. 2d 399; *State ex rel White* v. *Hilgeman*, 218 Ind. 527, 34 N. E. 2d 129) right to appeal to this court from said judgment and thus denying petitioner the equal protection and the due process of law guaranteed him by the Fourteenth Amendment to the Constitution of United States of America as construed by the United States Supreme Court in the cases of *Cochran*

v. *Kansas*, 316 U. S. 255, 62 S. Ct. 1068; *Ex parte Hull*, 61 S. Ct. 640. The gravamen of the petition and reply herein is the suppression complained of above. The failure of trial counsel to appeal, without pay, which is not denied by this court, is merely a pebble along the road to the citadel of suppression. Regardless of what counsel would or would not do or did or did not do, petitioner had the absolute and unconditional right to send said appeal documents out of said prison and perfect said appeal himself.

3. The decision of this court is contrary to law.

4. The court erred in denying the petition and refusing to grant relief against the judgment which remains in force as the result of said suppression.

Wherefore, petitioner respectfully prays the court for a rehearing herein and on said reconsideration the order denying the petition be in all things set aside, vacated, and held for naught and an order of this court made and entered ordering and directing the Jennings County Indiana Circuit Court to vacate, annul, and set aside the
303 judgment entered on the 23rd day of July 1931, in and by said Circuit Court in said cause therein entitled "The State of Indiana *vs.* Lawrence Cook, No. 2810," and further order and direct said Circuit Court to grant petitioner a new trial in said cause and for all further relief proper in the premises.

Respectfully submitted,

(Signed) Lawrence E. Cook,
Petitioner,

By (Signed) Mrs. Floyd E. (Florence L.) Cook,
Sister of Petitioner,

(Signed) Elbert E. Lasher,
Attorney for Petitioner.

304 And afterwards, to-wit; On the 17th day of December, 1946, the same being the ..... Judicial day of the November, 1946 Term of Court, the following further proceedings were had in said cause:

Comes now the parties by counsel and the court being advised in the premises, denies petitioner's motion heretofore filed herein for a rehearing, Frank E. Gilkison, *C. J.*

305 IN THE INDIANA SUPREME COURT.

Original Action.

Lawrence E. Cook,
Petitioner,
vs.
The State of Indiana,
Respondent.
} No. 28236.

PRAECIPE.

To the Clerk of the Above Entitled Court:

You are hereby requested to make a transcript of the record of this cause to be used in an application to the Supreme Court of the United States for a Writ of Certiorari in said cause, the transcript to consist of:

The petition for allowance of appeal and all exhibits attached thereto, filed therewith, and made a part thereof filed in said cause;

The motion of respondent for extension of time to file answer filed in said cause;

The answer of the State of plaintiff's petition for allowance of appeal filed in said cause;

The first and second motions of petitioner for extension of time to file reply filed in said cause;

The petitioner's reply to respondent's answer to plaintiff's petition for allowance of appeal and all exhibits attached thereto, filed therewith, and made a part thereof filed in said cause;

The opinion and order of the Supreme Court of the
306 State of Indiana in said cause;

The motion for rehearing in said cause;

All journal entries contained in the records and proceedings of the Supreme Court of the State of Indiana relating to said cause;

The final judgment and decision of the Supreme Court of the State of Indiana;

A copy of this praecipe;

Your certificate to the record that it is a complete record in said cause.

Signed: Lawrence E. Cook,
P. O. Box 41,
Michigan City, Indiana,
By: Mrs. Floyd E. (Florence) Cook,
Signed: Elbert E. Lasher,
Attorney for Petitioner.

307 State of Indiana. }
Supreme Court. }

I, Thomas C. Williams, Clerk of the Supreme Court of the State of Indiana, do certify the above and foregoing to be a true and complete copy of the papers requested in the attached Praecipe.

In Witness Whereof, I have hereunto set my hand and seal this 14th day of January, 1947.

Thomas C. Williams,
(Seal) *Clerk Supreme Court.*

308 And afterwards, to wit, on the 28th day of February, 1949, the following further proceedings were had in the above entitled cause, to wit:

Now here a memorandum opinion was filed by the Court, in the above entitled cause, which memorandum opinion reads in the words and figures following, to wit:

309 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—853) * *

MEMORANDUM OPINION.

(Filed Feb. 28, 1949. Margaret Long, Clerk.)

After the Court had dismissed the original petition for a writ of habeas corpus, the petitioner filed an amended petition. The respondent again moved to dismiss, and this motion was denied. Thereafter, the writ was issued, and a hearing followed on February 17, 1949.

The facts indicate that the petitioner was convicted in the Circuit Court of Jennings County, Indiana, of murder and was sentenced to life imprisonment on July 23, 1931. The next day he was taken to the Indiana State Prison at Michigan City, where he is still incarcerated. His attorneys seasonably filed a motion for a new trial in his behalf. This motion was denied October 16, 1931. It appears that his attorneys were not asked to act further in connection with the taking of an appeal because neither he nor his family could afford to pay any additional fees.

At this hearing, the petitioner testified that after his motion for a new trial had been denied, he proceeded to make a so-called "memory transcript" of the proceeding at his trial and that with the help of some other prison inmates, he prepared certain appeal papers. These included a notice of appeal, a praecipe for a transcript of the record, an assignment of errors, a motion to appeal in forma pauperis, and a request that the trial court appoint counsel to assist him in his appeal.

310 He further testified that he attempted to send these appeal papers out of the prison to the trial court for filing, but was prevented from doing so by the prison offi-

cials, and that he also attempted to have his sister obtain these documents from the prison warden so that she might file them. His sister testified that the Warden refused to give her the requested papers, saying that it was contrary to prison rules for them to go out.

The petitioner's testimony pertaining to his efforts to present an appeal of his case in his own behalf, and to his being thwarted in that effort during the statutory period in which he might have taken an appeal as a matter of right, is corroborated by the testimony of disinterested witnesses. And, though the respondent asserts that during the period in question the prisoners were not prevented from transmitting legal documents beyond the prison walls if the papers were presented through official channels, the preponderance of the evidence requires the court to find: (1) that the petitioner did prepare certain papers in connection with an intended appeal and (2) that he was arbitrarily prevented by the prison officials from sending these documents out of the prison.

These established facts require a redetermination of the Constitutional questions which were previously presented by the motions to dismiss. The Court has already decided that the petitioner has exhausted his state court remedies, and has assumed jurisdiction to hear and determine the issues on the merits.

Restated, the question is whether an incarcerated convicted person who has been denied his right to appeal in Indiana is thereafter deprived of his liberty in violation of the Equal Protection clause of the Fourteenth Amendment and is entitled to release from custody on application for a writ of habeas corpus. The petitioner maintains the affirmative, relying upon *Cochran* v. *Kansas*, 316 U. S. 255 (1942). The petitioner further asserts that such denial also violates the Due Process Clause of the Fourteenth
311 Amendment. In addition, he sets forth that he has been deprived of the Fourteenth Amendment guaranties of Due Process and Equal Protection in that the State of Indiana denied him the right to the assistance of counsel in perfecting an appeal from his conviction. In view of the conclusion of the Court with respect to the first proposition, it is deemed unnecessary to determine the further issues presented.

In ruling on the motion to dismiss the original petition in this case I said: "Only where it is established to the satisfaction of the court hearing the habeas corpus that,

had the prisoner been afforded his right to appeal, substantial errors could have been brought to the attention of the Appellate Court which probably would have resulted in a reversal, ought the violation of the constitutional guaranty of the Equal Protection clause be the means of effecting a full release. Otherwise, substance would be subordinated to form and violation of a bare technical right would be a prisoner's avenue of escape from just punishment."

Although this view is supported by *Miller* v. *Sanford*, 59 F. Supp. 812 (D. C. Ga., 1945) and *Thompson* v. *Johnson*, 160 F. (2d) 374 (C. A. 9th, 1947), I am now of the opinion, after further reflection, that the probability of the petitioner's prosecuting a successful appeal is not a proper consideration in determining whether a writ should issue and whether a discharge should be granted.

The writ of habeas corpus is never allowed to substitute for an appeal, and it cannot be used as a remedial procedure to correct errors committed in the trial of a criminal case. *Graham* v. *Squier*, 132 F. (2d) 681 (C. A. 9th, 1942); *Boykin* v. *Huff*, 121 F. (2d) 865 (App. D. C., 1941). On the other hand, habeas corpus in the federal courts in an appropriate remedy when there has been a denial of rights guaranteed by the federal Constitution and where no corrective procedure is afforded by the state or, if afforded, is in practice not available. *Hawk* v. *Olson*, 321 U. S. 114, 118 (1944). In *U. S.* v. *Hiatt*, 141 F. (2d) 644 (C. A. 3rd, 1944), Judge Maris states the current view of the proper use of habeas corpus in federal courts. In his opinion at page 665 he says:

> "In recent years, however, the use of the writ of habeas corpus in Federal Courts to test the validity of a conviction for crime by a civil court has been extended to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused and where habeas corpus is the only effective means of preserving such rights."

This doctrine is projected beyond the procedure of the trial itself. That is, the writ is proper, even though there has been no lack of due process in the proceedings leading to the conviction, but the detention has become illegal due to some subsequent event or omission. *Graham* v. *Squier, supra.* On the question of the right to an appeal in a criminal case, a somewhat similar question to that

presented here confronted the court in *Boykin* v. *Huff, supra.* There Justice Rutledge said: "But appellant asserts that it (the denial of an appeal) amounted to * * * a denial of a constitutional right. On that view he bases his claim to immediate freedom, and it would be entitled to serious consideration if the consequences of the court's mistake could be remedied in no other way."

Applying these principles to the instant case, and considering Cook's frustrated efforts to obtain a belated review of his conviction and the other ineffective efforts in the state courts to obtain his liberty, it is apparent that if there has been an omission in relation to his original attempt to appeal which amounts to a breach of his constitutional rights, the petitioner's remaining remedy is by a discharge of this writ of habeas corpus. Whether or not he is guilty of the crime for which he has been imprisoned for the past seventeen and one-half years is not material to the issues. *In re Yamashita,* 327 U. S. 1 (1941); *U. S.* v. *Ragen,* 146 F. (2d) 349 (C. A. 7th, 1945).

313 The right to appeal is guaranteed by the Indiana State Constitution and is available in all cases. *Warren* v. *Indiana Telephone Co.,* 217 Ind. 93, 26 N. E. (2d) 399 (1940). That means that every person convicted of a crime in Indiana may have his case reviewed if he takes the proper steps, regardless of the chances of reversal. In short, it is a part of the procedural due process afforded all convicted persons by the law of the state. *State* v. *Hilgeman,* 218 Ind. 572, 34 N. E. (2d) 129 (1946); *State* v. *Spencer,* 219 Ind. 148, 41 N. E. (2d) 601 (1941). It follows that where the right to prosecute an appeal is arbitrarily denied by state action, there is a deprivation of a substantial right which has the protection of the Federal Constitution. As stated in the *Boykin* case, *supra,* "The right of appeal, though statutory, is not insubstantial and its statutory origin does not make it a matter of such small consequence that it may be given or withheld arbitrarily."

Finally, a close analysis of the language in the *Cochrane* case indicates that the only test which the court may apply in a case of this kind is whether the petitioner has been arbitrarily deprived of a right accorded to all other persons in his circumstances in the State of Indiana.

In other words, the question is whether the petitioner

has been the object of arbitrary, unreasonable, and oppressive discrimination by the officials of the State, so that his further incarceration is contrary to the prohibitions of the Fourteenth Amendment to the Federal Constitution. The conclusion of the Court is that he has, and that the arbitrary suppression of the papers which he had prepared in an attempt to perfect an appeal was contrary to the Equal Protection Clause of the Fourteenth Amendment. For this reason and on the authority of the *Cochrane* case, *supra*, the Court holds that the petitioner is entitled to be discharged from the custody of the respondent.

314 Before a formal order is entered to that effect, the Attorney General of Indiana will be given until 12:00 o'clock noon, March 3, 1949, to indicate his views relating to the release of the petitioner under the provisions of Rule 26.3 of the Rules of the Court of Appeals for the Seventh Judicial Circuit.

Luther M. Swygert,
Judge.

Hammond, Indiana,
February 28, 1949.

315 And afterwards, to wit, on the 10th day of March, 1949, the following further proceedings were had in the above entitled cause, to wit:

Now here the court enters an order of discharge, which order of discharge reads in the words and figures following, to wit:

ORDER.

The Court having heard and considered the evidence and the arguments of counsel on the amended petition for a writ of habeas corpus and having rendered its memorandum opinion embodying findings of fact and conclusions of law on February 28, 1949, and having heard and considered the views of counsel respecting the release of the petitioner under the provisions of Rule 26.3 of the Rules of the Court of Appeals for the Seventh Judicial Circuit,

It is now ordered that the petitioner, Lawrence E. Cook, be released from the custody of the respondent and dis-

charged on the writ upon his furnishing to the court his own personal recognizance to secure his presence pending the appeal of the respondent to the Court of Appeals for the Seventh Judicial Circuit.

Enter:

Luther M. Swygert,
Judge.

Hammond, Indiana,
March 10, 1949.

316 And afterwards, to wit, on the 11th day of March, 1949, the following further proceedings were had in the above entitled cause, to wit:

Comes now the plaintiff herein, and files a recognizance bond, which bond is approved by the Court and reads in the words and figures following, to wit:

317 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—853) * *

RECOGNIZANCE BOND.

Lawrence Cook is held and firmly bound unto the United States of America in the penal sum of Five Thousand Dollars ($5,000.00) well and truly to be paid.

The conditions of the foregoing bond are that whereas the said Lawrence E. Cook has been released upon his petition for a writ of habeas corpus by the United States District Court for the Northern District of Indiana, and whereas the State of Indiana has indicated its intention to appeal from said judgment releasing said Cook,

Now, if the said Lawrence Cook shall appear in said District Court of the United States upon order of said court and after reversal of said judgment, then this bond to be null and void; otherwise in full force and effect. The foregoing is binding on the said Cook, his heirs and assigns.

Executed this 11th day of March, 1949.

Lawrence E. Cook.

State of Indiana, }
Co. of La Porte. }

Before me, the undersigned Notary Public, personally appeared Lawrence E. Cook and acknowledged the execution of the foregoing bond.

Witness my hand and notarial seal this 11 day of March, 1949.

Frank M. Swanson,
Notary Public.

(Seal)

My commission expires May 24, 1949.

Examined and approved by me.

Luther M. Swygert,
United States Judge for the Northern District of Indiana.

March 11, 1949.

318 Whereupon an order on release forthwith is entered by the court, and the order of release reads in the words and figures following, to wit:

UNITED STATES DISTRICT COURT.

* * (Caption—853) * *

ORDER.

(Filed Mar. 11, 1949. Margaret Long, Clerk.)

The petitioner Lawrence E. Cook having furnished his personal recognizance pursuant to the order of this court dated March 10, 1949, and said recognizance having been approved by the Court.

It Is Now Ordered that the said Lawrence E. Cook be released forthwith from the custody of the respondent, Ralph Howard, Warden of the Indiana State Prison.

Enter:

Luther M. Swygert,
Judge.

Hammond, Indiana,
March 11, 1949.

Marshal's Return: I hereby certify and return that I received the within order at Hammond, Indiana, on March 11, 1949, and on March 11, 1949, at Ind. State Prison, Michigan City, Indiana, I served the within named Ralph Howard, by reading to and leaving with L. M. Schmuhl, Deputy Warden at the Indiana State Prison, a true and certified copy of the order.

Al W. Hosinski,
U. S. Marshal,
By George E. Mayberry,
Deputy.

Marshal costs: Service of Writ.....$2.00
Mileage 2.45
$4.45

South Bend Division.

219 And afterwards, to wit, on the 25th day of March, 1949, the following further proceedings were had in the above entitled cause, to wit:

Comes now the defendant, respondent herein, and files a Notice of Appeal to the United States Circuit Court of Appeals for the Seventh Judicial Circuit, which Notice of Appeal reads in the words and figures following, to wit:

NOTICE OF APPEAL TO THE COURT OF APPEALS FOR THE SEVENTH JUDICIAL CIRCUIT.

Notice is hereby given that Ralph Howard, Warden of the Indiana State Prison, respondent above named, hereby appeals to the Court of Appeals for the Seventh Judicial Circuit from the final judgment entered in this action on March 10, 1949.

J. Emmett McManamon,
Attorney General of Indiana,
Charles F. O'Connor,
Deputy Attorney General,
Merl M. Wall,
Deputy Attorney General,
Attorneys for Appellant.
Address: 219 State House,
Indianapolis (4) Indiana.

(Copy mailed to Attorney William E. Isham, Fowler, Ind. 3/25 1949 H. M.)

And afterwards, to wit, on the 25th day of March, 1949, the following further proceedings were had in the above entitled cause, to wit:

Comes now the respondent herein, and files an application for Certificate of probable cause, which application for Certificate of Probable cause reads in the words and figures following, to wit:

320 APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE.

Comes now the respondent herein, Ralph Howard, by his attorneys, J. Emmett McManamon, Attorney General of Indiana, Charles F. O'Connor, Deputy Attorney General, and Merl M. Wall, Deputy Attorney General, and announces that he desires to appeal from the judgment rendered against him in the above entitled cause of action entered on March 10, 1949.

And whereas, said respondent believes that he is aggrieved by said judgment of this Court and that the same is erroneous and against the decisions of the Supreme Court of the United States, as to the scope and affect of a decision of the Supreme Court of the State of Indiana and of the decision of the Supreme Court of the United States, in its denial of Petitioner's appeal to said Court by way of Writ of Certiorari, and believing that the judgment of this Court is erroneous thereon, does now respectfully petition this Court for a Certificate of Probable Cause in this matter.

Respectfully submitted,

J. Emmett McManamon,
Attorney General of Indiana,
Charles F. O'Connor,
Deputy Attorney General,
Merl M. Wall,
Deputy Attorney General,
Attorneys for Respondent.

And the Court now enters an order thereon, granting the application for Certificate of Probable cause as follows:

ORDER.

The respondent having announced his decision to appeal the judgment of this Court, entered in this cause on March 10, 1949, and having filed with this Court his Application for Certificate of Probable Cause, setting forth the reasons why same should be granted, the Court having duly considered said application does now find that there is sufficient grounds for the issuance of a Certificate of Probable Cause for an appeal to the Court of Appeals for the Seventh Judicial Circuit, and that the same should be granted.

321 It is now ordered that the Respondent, Ralph Howard, is entitled to a Certificate of Probable Cause for an appeal to the Court of Appeals for the Seventh Judicial Circuit and the same is hereby granted.

Enter:

Luther M. Swygert,
Judge.

Hammond, Indiana,
March 25, 1949.

And afterwards, to wit, on the 6th day of April, 1949, the following further proceedings were had in the above entitled cause, to wit:

Comes now the respondent, appellant herein, and files designation of portions of record to be contained in record on appeal and proof of service of same, together with statement of points to be relied upon for appeal and proof of service of same, which designation of portions of record to be contained in record on appeal, Statement of points to be relied upon on appeal and proof of service of same read in the words and figures following, to wit:

322 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption 853) * *

DESIGNATION OF PORTIONS OF RECORD TO BE CONTAINED IN RECORD ON APPEAL.

(Filed April 6, 1949. Margaret Long, Clerk.)

Appellant designates the following portions of the record to be contained in the record on appeal in the above entitled action:

1. The original Petition for Habeas Corpus,
2. Respondent's Motion to Dismiss,
3. Order sustaining Respondent's Motion to Dismiss,
4. Petitioner's Amended Petition for Writ of Habeas Corpus,
5. Respondent's Motion to Dismiss Amended Petition,
6. Transcript of the evidence,
7. Respondent's Exhibit No. 1, being Petitioner's Application for Delayed Appeal to the Supreme Court of the State of Indiana and Petition for Writ of Certiorari to the Supreme Court of the United States,
8. Memorandum Opinion of the Court,
9. Notice of Appeal,
10. This designation, and
11. Statement of Points upon which Appellant Intends to Rely on Appeal.

J. Emmett McManamon,
Attorney General.

Frank E. Coughlin,
Deputy Attorney General.

Merl M. Wall,
Deputy Attorney General,
Attorneys for Appellant.
Address: Room 219 State House
Indianapolis, 4, Indiana.

April 5, 1949

323 IN THE DISTRICT COURT OF THE UNITED STATES.
• • (Caption—853) • •

STATEMENT OF POINTS RELIED UPON FOR APPEAL.

(Filed April 6, 1949. Margaret Long, Clerk.)

The Appellant states that the points upon which he intends to rely on the appeal in this action are as follows:

1. That the District Court for the Northern District of Indiana has no jurisdiction of the cause of action.

2. That all questions attempted to be raised by the Petition for Writ of Habeas Corpus were fully and completely adjudicated by the Supreme Court of Indiana and by the United States Supreme Court on appeal and by Petition for Writ of Certiorari.

J. Emmett McManamon,
Attorney General.

Frank E. Coughlin,
Deputy Attorney General.

Merl M. Wall,
Deputy Attorney General,
Attorneys for Appellant.
Address: Room 219 State House
Indianapolis, 4
Indiana

April 5, 1949

324 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—853) * *

PROOF OF SERVICE.

Merl M. Wall, being duly sworn upon his oath, says that he is one of the attorneys of record for the Respondent-Appellant in the above entitled cause.

Affiant further says that on the 5th day of April, 1949, he mailed copies of Respondent-Appellant's

"Designation of Portions of Record to be Contained in Record on Appeal", and "Statement of Points Relied Upon for Appeal",

in the above entitled cause, to Mr. W. S. Isham, Attorney-at-law, Fowler, Indiana, Attorney for Petitioner, by placing same in an envelope, addressing same as above, affixing the proper amount of postage thereto, and placing same in the United States mails.

Affiant makes this affidavit for the purpose of showing proof of delivery of copies of said "Designation of Portions of Record to be Contained in Record on Appeal" and "Statement of Points Relied Upon for Appeal" to Petitioner, as required by Rule 75 (a) and (d) of the Amended Rules of Civil Procedure.

Merl M. Wall,
Deputy Attorney General.

Subscribed and sworn to before me this 11th day of April, 1949.

Virginia Hilliard (Buckels),
(Seal) *Notary Public.*

My commission expires June 24, 1950.

325 And now the respondent, Appellant herein, files a Motion to extend time to file transcript of record on appeal, which Motion to extend time to file transcript of record on appeal reads in the words and figures following, to wit:

326 MOTION TO EXTEND TIME TO FILE TRANSCRIPT OF RECORD.

Appellant moves this Court that he be granted until May 16, 1949 to file the Transcript of Record on Appeal in this action.

J. Emmett McManamon,
Attorney General,
Frank E. Coughlin,
Deputy Attorney General,
Merl M. Wall,
Deputy Attorney General,
Attorneys for Appellant,
Address: Room 219 State House
Indianapolis (4) Indiana

April 5, 1949

And afterwards, to wit, on the 13th day of April, 1949, the following further proceedings were had in the above entitled cause, to wit:

Now here an order is entered granting the extension of time in which to file transcript of record on appeal, which order reads in the words and figures following, to wit:

ORDER EXTENDING TIME TO FILE TRANSCRIPT OF RECORD.

The motion of the respondent for an extension of time within which to file the transcript of record on appeal is granted. Respondent shall have to and including May 16, 1949, within which to file the transcript.

Enter:

Luther M. Swygert,
Judge.

327 And afterwards, to wit, on the 14th day of April, 1949, the following further proceedings were had in the above entitled cause, to wit:

Comes now the plaintiff, appellee herein, and files a designation of additional portions of the record on appeal, which designation of additional portions of the record on appeal reads in the words and figures following, to wit:

328 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—853) * *

DESIGNATION OF ADDITIONAL PORTIONS OF THE RECORD BY APPELLEE.

(Filed April 14, 1949. Margaret Long, Clerk.)

Appellee hereby designates as an additional part of the record to be contained in the record on appeal in the above entitled action:

1. The Memorandum Opinion of the Court in ruling upon respondent's motion to dismiss the original petition for Habeas Corpus.

Fraser & Isham,
Fowler, Indiana,
Attorneys for Appellee.

329 And afterwards, to wit, on the 15th day of April, 1949, the following further proceedings were had in the above entitled cause, to wit:

Comes now the respondent-appellant herein, and files proof of service of the motion for extension of time within which to file transcript of record on appeal, which proof of service reads in the words and figures following, to wit:

330 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—853) * *

PROOF OF SERVICE.

(Filed April 15, 1949. Margaret Long, Clerk.)

Merl M. Wall, being duly sworn upon his oath, says that he is one of the attorneys of record for the Respondent-Appellant in the above entitled cause.

Affiant further says that on the 13th day of April, 1949, he mailed a copy of Respondent-Appellant's "Motion to Extend Time to File Transcript of Record" in the above entitled cause, to Mr. W. S. Isham, Attorney-at-Law, Fowler, Indiana, Attorney for Petitioner, by placing same in an envelope, addressing same as above, affixing the proper amount of postage thereto, and placing same in the United States mail.

Affiant makes this affidavit for the purpose of showing proof of delivery of a copy of said "Motion to Extend Time to File Transcript of Record" to Petitioner, as required by Rule 75 (a) and (d) of the Amended Rules of Civil Procedure.

Merl M. Wall,
Deputy Attorney General.

Subscribed and sworn to before me this 13th day of April, 1949.

Virginia Hilliard (Buckels),
(Seal) *Notary Public.*

My commission expires June 24, 1950.

331 CLERK'S CERTIFICATE.

United States of America,
Northern District of Indiana. } ss:

I, Margaret Long, Clerk of the United States District Court in and for the Northern District of Indiana, do hereby certify that the annexed and foregoing is a true and full copy of the original pleas and proceedings had in Civil No. 853, South Bend Division, entitled:

United States *ex rel.*
Lawrence E. Cook,

vs.

Ralph Howard, Warden of the
Indiana State Prison,

as requested in the Designation of Contents of Record on Appeal, of the respondent, appellant herein, and the Designation of additional portions of record on appeal, filed by the plaintiff, Appellee herein, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at South Bend, Indiana, this 20th day of April, A. D. 1949.

Margaret Long, *Clerk,*
United States District Court,
By Helen Mulrey,
Deputy Clerk.

(Seal)

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed transcript of record, filed in this Court on August 29, 1949, in

Cause No. 9909.

United States of America, ex rel., Lawrence E. Cook,
Petitioner-Appellee,

vs.

Alfred F. Dowd, as Warden of the Indiana State Prison,
Respondent-Appellant,

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 7th day of April, A. D. 1950.

(Seal)

Kenneth J. Carrick,
Clerk of the United States Court of Appeals for the Seventh Circuit.

At a regular term of the United States Court of Appeals for the Seventh Circuit, held in the City of Chicago and begun on the fifth day of October, in the Year of our Lord one thousand, nine hundred and forty-eight, and of our Independence the one hundred seventy-third.

United States of America, ex rel., Lawrence E. Cook, *Petitioner-Appellee,* *vs.* Ralph Howard, as Warden of the Indiana State Prison, *Respondent-Appellant.*	Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.

9909

And afterward, to-wit, on the sixteenth day of May, 1949, there was filed in the office of the Clerk of this Court an appearance for the appellants, which said appearance is in the words and figures following, to-wit:

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Cause No. 9909.

United States of America, ex rel., Lawrence E. Cook,
Petitioner-Appellee,

vs.

Ralph Howard, as Warden of the Indiana State Prison,
Respondent-Appellant.

The Clerk will enter our appearance as counsel for Appellant.

J. Emmett McManamon,
Attorney General of Indiana,
Room 219 State House,
Indianapolis, Ind.

Merl M. Wall,
Deputy Attorney General,
Room 219 State House,
Indianapolis, Ind.

Endorsed: Filed May 16, 1949. Kenneth J. Garrick, Clerk.

And afterward, to-wit, on the eighteenth day of May, 1949, there was filed in the office of the Clerk of this Court an appearance for the appellee, which said appearance is in the words and figures following, to-wit:

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Cause No. 9909.

United States of America, ex rel., Lawrence E. Cook,
Petitioner-Appellee,

vs.

Ralph Howard, as Warden of the Indiana State Prison,
Respondent-Appellant.

The Clerk will enter my appearance as counsel for Appellee.

William S. Isham,
Fowler, Indiana.

Endorsed: Filed May 18, 1949. Kenneth J. Carrick, Clerk.

And afterward, to-wit, on the ninth day of August, 1949, there was filed in the office of the Clerk of this Court a motion to substitute party-respondent, which said motion is in the words and figures following, to-wit:

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

United States, ex rel., Lawrence E. Cook,
Petitioner,
vs.
Ralph Howard, as Warden of the Indiana State Prison,
Respondent.
} Cause No. 9909.

MOTION TO SUBSTITUTE PARTY.

Comes now the Respondent, in the above entitled cause, by his attorneys, J. Emmett McManamon, Attorney General of Indiana, Charles F. O'Connor, Deputy Attorney General, and Merl M. Wall, Deputy Attorney General, and suggests to the Court that on or about the 15th day of April, 1949, the Honorable Alfred F. Dowd was appointed by the Governor of Indiana to be the Warden of the Indiana State Prison, replacing the Honorable Ralph Howard, the former Warden of said Prison;

And that the said Alfred F. Dowd, since on or about the 15th day of April, 1949, has been the duly appointed, qualified and acting Warden of the Indiana State Prison.

Wherefore, the Respondent respectfully asks this Court to substitute the name of Alfred F. Dowd, now the Warden of the Indiana State Prison, as the Respondent in the above entitled cause of action.

J. Emmett McManamon,
Attorney General of Indiana.
Charles F. O'Connor,
Deputy Attorney General.
Merl M. Wall,
Deputy Attorney General.
Attorneys for Respondent,
Room 219 State House,
Indianapolis 4, Indiana.

Granted: Kerner.

Endorsed: Filed Aug. 9, 1949. Kenneth J. Carrick, Clerk.

And afterward, to-wit, on the tenth day of August, 1949, the following further proceedings were had and entered of record, to-wit;

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

August 10, 1949.

Before:

Hon. Otto Kerner, Circuit Judge.

United States of America, ex rel., Lawrence E. Cook, *Petitioner-Appellee*, vs. Ralph Howard, as Warden of the Indiana State Prison, *Respondent-Appellant*.	Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.

9909

On motion of counsel for the respondent-appellant, it is ordered that the name of Alfred F. Dowd, Warden of the Indiana State Prison, be substituted as party respondent-appellant in this cause in the place and stead of Ralph Howard, former Warden.

And afterward, to-wit, on the seventeenth day of January, 1950, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

January 17, 1950.

Before:

Hon. J. Earl Major, Chief Judge.
Hon. Otto Kerner, Circuit Judge.
Hon. F. Ryan Duffy, Circuit Judge.

United States of America, ex rel., Lawrence E. Cook, *Petitioner-Appellee,* vs. Alfred F. Dowd, as Warden of the Indiana State Prison, *Respondent-Appellant.*	Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.

9909

Now this day come the parties by their counsel and this cause comes on to be heard on the transcript of the record and the briefs of counsel and on oral argument by Mr. Merl M. Wall and Mr. Charles F. O'Connor, counsel for the appellant, and by Mr. William S. Isham, counsel for the appellee, and the Court takes this matter under advisement.

And afterward, to-wit, on the seventh day of February, 1950, there was filed in the office of the Clerk of this Court the opinion of the Court which said opinion is in the words and figures following, to-wit:

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 9909 October Term, 1949, January Session, 1950.

The United States of America, ex rel., Lawrence E. Cook, *Petitioner-Appellee,* *vs.* Alfred F. Dowd, as Warden of the Indiana State Prison, *Respondent-Appellant.* } On appeal from the United States District Court for the Northern District of Indiana, South Bend Division.

February 7, 1950.

Before MAJOR, *Chief Judge*, KERNER and DUFFY, *Circuit Judges.*

DUFFY, *Circuit Judge.* Petitioner Cook filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Indiana. Respondent filed a motion to dismiss which was granted June 24, 1948. Thereafter petitioner was granted leave to file an amended petition for a writ of habeas corpus. Respondent again filed a motion to dismiss, but this motion was denied. After respondent filed his return and answer a hearing was held, and on February 28, 1949, the court rendered its decision and ordered the petitioner discharged from custody.

Petitioner was convicted of murder in the Jennings Circuit Court of Indiana on July 23, 1931, and was sentenced to life imprisonment. At his trial he was represented by qualified attorneys of his own choice. The day following his conviction he was taken to the Indiana State Prison. Petitioner's attorneys filed a timely statutory motion for a

new trial, which was denied. Under the law of Indiana as it existed at that time, petitioner had six months in which to perfect an appeal of his case to the Supreme Court of Indiana. The district court found that within such six months period, with the aid of other prisoners, Cook prepared certain appeal papers, including a notice of appeal, a praecipe for a transcript of the record, an assignment of errors, a motion to appeal in forma pauperis, and a request that the trial court appoint counsel to assist him on the appeal. He also prepared a "memory transcript" of the proceedings at his trial. Cook attempted to send these papers to the Jennings Circuit Court but was told by prison authorities that sending out such papers from the prison was against a prison rule. As a result the six month period expired and the papers thus prepared did not reach the court. Although the district court did not make a finding of the point, it was established by the evidence that after Warden Kunkle took charge in June, 1933, sending out legal papers from the prison was no longer restricted.

In October, 1937, petitioner filed a petition in the Jennings Circuit Court for a writ of coram nobis. After considerable complications, involving the sitting of at least three special judges, the petition was denied. During the course of these proceedings the matter reached the Indiana Supreme Court twice. *Cook* v. *Indiana,* 219 Ind. 234, 37 N.E. (2d) 63 (1941); *State ex rel. Cook* v. *Wickens,* 222 Ind. 383, 53 N.E. (2d) 630 (1944). In April, 1945, the petitioner filed a petition for habeas corpus in the Circuit Court of LaPorte County and in June of 1945 he filed a similar petition in the United States District Court for the Northern District of Indiana. Both petitions were denied. On appeal the ruling of the State court was affirmed by the Supreme Court of Indiana. *State ex rel. Cook* v. *Howard,* 223 Ind. 694, 64 N.E. (2d.) 25 (1945), cert. den. 327 U.S. 808 (1946). In its opinion the Indiana Supreme Court stated (223 Ind. at p. 699: 64 N.E. (2d.) at p. 27):

> "If appellant has been denied the privilege of appealing his case, by the warden and employees of the prison where he is serving, until the time allowed by statute for an appeal has expired, that fact would not nullify the judgment lawfully rendered against him by the Jennings Circuit Court. It would merely extend the time for appeal during the period of such disability. In aid of its ap-

> pellate powers and functions this court has both inherent and statutory power to entertain and determine a petition to appeal after the time allowed by statute therefor has expired, under the conditions set forth in paragraph one of appellant's complaint. * * *"

Thereafter petitioner filed a petition in the Indiana Supreme Court for a delayed appeal in his case; this petition was denied and certiorari to the United States Supreme Court was again sought but denied.

When Cook sought to appeal to the Indiana Supreme Court in response to the invitation to do so, he attempted to support his allegations by filing various affidavits. No oral testimony was taken. The State Attorney General filed affidavits in opposition, and one of the petitioner's trial attorneys filed an affidavit that neither he nor his co-counsel had refused to perfect an appeal because petitioner was unable to pay for the attorney fees involved. In denying Cook's petition for appeal, the Indiana Supreme Court said,

> "The court having examined and considered said petition, the answer thereto, and petitioner's reply and all of said affidavits and being duly advised in the premises, finds that the basic allegation of said petition to wit: that petitioner's counsel refused without pay, to take an appeal is not true; and that petitioner is entitled to no relief herein."

In a petition for rehearing Cook endeavored to stress the point that he had been denied the right to present his appeal papers by the prison authorities within the six months period, but the petition for rehearing was denied without further comment.

In a memorandum opinion accompanying its order of June 24, 1948, dismissing the petition for a writ of habeas corpus, the district court stressed the point that petitioner had not made a sufficient showing that the errors complained of were of a substantial character and that there was probable cause to believe a reversal would be obtained upon an appeal. However, on October 22, 1948, the district court permitted the filing of an amended petition for a writ of habeas corpus. A motion for dismissal was denied and the writ was issued, and shortly thereafter a hearing was held. In an opinion accompanying the order discharging the petitioner from custody, the court stated that on further re-

flection it was convinced that the probability of the petitioner's prosecuting a successful appeal is not a proper consideration in determining whether a writ should issue, and whether a discharge should be granted. We are in accord with this view.

Petitioner claims he was deprived of his liberty in violation of the equal protection clause of the XIV Amendment to the United States Constitution. He claims that the State of Indiana through its prison officials denied him the equal right afforded to all persons convicted of crime in Indiana to prosecute an appeal.

In the district court and in his statement of points on this appeal, respondent insisted that the district court had no jurisdiction of the cause of action. However, in his brief in this court respondent admits that the court had jurisdiction but argues that the issuing of the writ and the consideration of the case on the merits was an abuse of discretion by the trial court.

Respondent lays much emphasis on his claim that the Supreme Court of Indiana has passed on the merits of the present controversy, by denying the petition to permit a delayed appeal. Respondent insists that such denial is res judicata as to the present issues and obtains great comfort from the fact the United States Supreme Court refused to grant certiorari. He states, "The United States Supreme Court, by denying certiorari when this identical point was plainly set forth and reiterated, likewise decided against the Petitioner-Appellee."

The question raised as to res judicata, and the effect of the denial of the petition for certiorari, requires little discussion. The question before the Indiana Supreme Court, presented by affidavits, as to whether as a matter of grace it would permit the prosecution of a delayed appeal, is entirely different than the issues before the district court. We hold the principle of res judicata does not apply. *Waley* v. *Johnston*, 316 U.S. 101, 105.

As to the effect of the denial of the petition for a writ of certiorari, the Supreme Court has emphasized time and time again that the merits of a case are not decided upon the denial of such petitions. *Wade* v. *Mayo*, 334 U.S. 672, 680. As was stated by Justice Frankfurter in *State of Maryland* v. *The Baltimore Radio Show, Inc.*, decided January 9, 1950, the denial of certiorari in a case might be for the reason "the decision may be supportable as a matter of State law, not subject to review by this Court, even

though the State court also passed on issues of federal law." Surely the right of a State to open or close the doors of its Supreme Court for an appeal after the expiration of the statutory period is a non-federal matter. We hold there is no significance whatever as to the issues here before us in the denial by the Supreme Court of the petition for certiorari.

Respondent insists the rule is that federal courts interfere with the administration of justice in State courts only "in rare cases" presenting "exceptional circumstances of peculiar urgency."[1] If the quotation states a rule, it is not applicable here where there has been an exhaustion of State remedies. *Ex parte Hawk*, 321 U.S. 114, 117-118.

The Indiana State Constitution guarantees the right to appeal in all cases. *Warren* v. *Indiana Telephone Co.*, 217 Ind. 93, 26 N.E. (2d.) 399. A convicted defendant in a criminal case in Indiana may have his case reviewed regardless of the chance for a reversal. *State ex rel. White* v. *Hilgeman*, 218 Ind. 572, 34 N.E. (2d.) 129; *State* v. *Spencer*, 219 Ind. 148, 41 N.E. (2d.) 601. We hold that when petitioner was denied the right to appeal within the statutory period, he was deprived of a substantial right.

The situation in the case at bar is unusual in that the petitioner is not claiming he was deprived of any constitutional right during the trial or up to and including the judgment of conviction. We think, however, that he correctly claimed his detention became illegal by reason of events subsequent to his conviction. *Graham* v. *Squier*, 132 F. (2d.) 681, 683. In *Cochran* v. *Kansas, et al.*, 316 U.S. 255, the petitioner alleged that officials at the State Penitentiary in enforcing prison rules suppressed appeal papers making it impossible for him to effect an appeal within the two year period allowed by the Kansas statute. The Supreme Court, recognizing that the equal protection clause of the XIV Amendment, U. S. Const., was violated if such charges were true, ordered (p. 258):

> "• • • Since no determination of the verity of these allegations appears to have been made, the cause must be remanded for further proceedings."

Based upon substantial evidence herein, the district court found that petitioner was deprived by officials of the State

[1] Quotation from *United States ex rel. Kennedy, et al.* v. *Tyler, Sheriff et al.*, 269 U. S. 13, 17.

of Indiana of his right to appeal his conviction. The court also properly found that the petitioner has exhausted his State remedies. Under the circumstances habeas corpus in the federal courts was and is his appropriate and only remaining remedy, for no corrective procedure is provided by the State, or, if afforded is not available. *Ex parte Hawk*, supra, p. 118. The petitioner was arbitrarily deprived of a right secured to other persons convicted of crime in Indiana. This resulted in a denial of his constitutional rights under the XIV Amendment, U. S. Const. Whether he is guilty or innocent of the crime for which he was convicted largely upon circumstantial evidence, and incarcerated for 17½ years, is not material to the issue before us. *In Re Yamashita*, 327 U. S. 1; *United States ex rel. Kimler* v. *Ragen, Warden*, 147 F. (2d.) 137.

Upon the oral argument before this court the attorney for respondent advanced a rather ingenious argument. He contended that conceding that petitioner was prevented during his incarceration during 1931, 1932, and up to June, 1933, from sending out his appeal papers, nevertheless after Warden Kunkle took charge the restriction was lifted. He argues that petitioner's right to send out the papers had merely been suspended prior to June, 1933, and that when he then did not apply within six months after the ban was lifted he thereafter waived his right to claim a violation of the XIV Amendment. We think this contention is without merit. Petitioner testified that he did not know for a long period after the new warden was in charge that there had been any change in the rule, stating that he did not attend or hear of a meeting of inmates which some witnesses claimed was held. But, in any event, petitioner thought his six months for appeal had been irretrievably lost and continued in that viewpoint until the Supreme Court of Indiana made the announcement hereinbefore quoted. Under such circumstances we hold that petitioner did not waive his right to claim a violation of the XIV Amendment, U. S. Const.

We are of the opinion that under the findings of the district court, which we cannot disturb because they are based upon substantial evidence, the district court correctly entered the order discharging the petitioner from custody. *Hawk* v. *Olson, Warden*, 326 U.S. 271, 274. Order affirmed.

KERNER, *Circuit Judge*, dissenting.

I cannot agree that a prisoner whose guilt was established by a regular verdict and who has made no contention that the judgment finding him guilty of murder was void, should escape punishment under the facts in this case.

Cook was convicted of murder and was sentenced to life imprisonment. On April 6, 1945, he filed a petition for a writ of habeas corpus in a circuit court of Indiana. In this petition he alleged that within six months after his conviction of murder he was prevented by the prison warden and prison employees from mailing or otherwise sending out his appeal papers, and that by reason thereof, he "has been and now is deprived of the equal protection of the law and his said imprisonment is in violation of said Fourteenth Amendment." The petition was denied by the LaPorte Circuit Court. On appeal, the judgment was affirmed, *State ex rel. Cook* v. *Howard*, 223 Ind. 694, and the United States Supreme Court denied certiorari. 327 U.S. 808.

On October 4, 1946, he filed a petition in the Supreme Court of Indiana for allowance of appeal from the judgment convicting him of murder. In this petition he again alleged substantially the same facts contained in his petition for habeas corpus. The court entertained the proceeding on its merits. True, no oral testimony was heard, but the parties submitted the question to the Supreme Court of Indiana upon affidavits, and that court, upon consideration of the affidavits, denied the petition. Thus, the court held that Cook's imprisonment for the crime of murder was not in violation of the Fourteenth Amendment. Cook, still claiming a violation of his constitutional rights, filed an application for certiorari in the United States Supreme Court, but it was denied, 330 U.S. 841.

Based upon the same grounds alleged in his petition for habeas corpus filed in the LaPorte Circuit Court and in his petition for allowance of appeal filed in the Supreme Court of Indiana, Cook, on October 22, 1948, filed the present petition for a writ of habeas corpus. Under these circumstances I do not believe the District Court was justified in issuing the writ. *Ex parte Hawk*, 321 U.S. 114, and *Wade* v. *Mayo*, 334 U.S. 672. I would reverse the judgment with directions to dismiss the petition.

And on the same day, to-wit, on the seventh day of February, 1950, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Tuesday, February 7, 1950.

Before:

Hon. J. Earl Major, Chief Judge.
Hon. Otto Kerner, Circuit Judge.
Hon. F. Ryan Duffy, Circuit Judge.

United States of America, ex rel., Lawrence E. Cook, *Petitioner-Appellee,* *vs.* Alfred F. Dowd, as Warden of the Indiana State Prison, *Respondent-Appellant.*	Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.

9909

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, South Bend Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed.

And afterward, to-wit, on the eighth day of March, 1950, the mandate of this Court issued to the United States District Court for the Northern District of Indiana, South Bend Division.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of papers filed and proceedings had, excepting motions and orders relating to filing of briefs and briefs of counsel, in

Cause No. 9909.

United States of America, ex rel., Lawrence E. Cook,
Petitioner-Appellee,

vs.

Alfred F. Dowd, as Warden of the Indiana State Prison,
Respondent-Appellant,

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 7th day of April, A. D. 1950.

(Seal)

Kenneth J. Carrick,
Clerk of the United States Court of Appeals for the Seventh Circuit.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. 66

ORDER ALLOWING CERTIORARI—Filed October 16, 1950

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

No. 66

OCTOBER TERM, 1950

ALFRED F. DOWD, AS WARDEN OF THE INDIANA STATE PRISON,

Petitioner,

vs.

UNITED STATES OF AMERICA, EX REL., LAWRENCE E. COOK,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE PETITIONER

J. EMMETT MCMANAMON,
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IN THE

Supreme Court of the United States

No. 66

OCTOBER TERM, 1950

ALFRED F. DOWD, AS WARDEN OF THE INDIANA STATE PRISON,

Petitioner,

vs.

UNITED STATES OF AMERICA, EX REL., LAWRENCE E. COOK,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Appeals is set forth in full at page 203 through page 209 of the Transcript of the Record, and has been officially reported at page 212 of 180 Fed. (2d).

JURISDICTION

The judgment of the court of Appeals was entered February 7, 1950. (Record, p. 210.) Petition for Certiorari

was filed May 8, 1950, and was granted October 16, 1950. This Court's jurisdiction is based on 62 Stat. 928, Title 28 United States Code, Section 1254 (1).

QUESTIONS PRESENTED

1. Is a prisoner, temporarily prevented from taking an appeal, denied equal protection of the law? In other words, may a convicted prisoner, whose conviction and imprisonment is based on an unquestioned, valid judgment, obtain his freedom by habeas corpus, for the reason that prison officials temporarily denied him the right to appeal; or can the right be considered in a state of suspension during the period of disability and then restored when the disability is removed? Can the State remove the disability, and thereby restore the right to an appeal, and thus provide the prisoner with equal protection of the law?

2. If the right to an appeal can be considered in a state of suspension during the period of disability, thus preventing the running of the time limitation on appeals, does the time limitation begin to run at the time that the restraint is removed and the petitioner obtains knowledge of the removal of such restraint?

3. When a petition for late appeal (based on *questions of fact* as to whether or not a prisoner was prevented from taking an appeal) is presented to a State Supreme Court, and said Court denies said petition but is silent as to the basis for decision, can it not be presumed that the *questions of fact* were decided against the petitioner and have become res judicata; so that a Federal District Court

should not thereafter hear evidence and again determine these same *questions of fact* in habeas corpus proceedings?

4. Is a prisoner, who is imprisoned under an unquestioned, valid judgment of a State Court, entitled to the extraordinary remedy of complete freedom in habeas corpus proceedings in a Federal Court, because of matters occurring subsequent to said judgment?

STATEMENT OF THE CASE

Respondent was adjudged guilty of murder on the 23rd day of July, 1931, by the Jennings Circuit Court, Jennings County, Indiana, and sentenced to the Indiana State Prison for life. (Record, p. 4.)

On October 22, 1948, respondent filed an amended petition for writ of habeas corpus in the United States District Court for the Northern District of Indiana, in which he alleged, in substance, that Warden Daly and other officers of the Indiana State Prison prevented him from sending appeal documents out of said prison within the six months period allowed by law to appeal; and that because of such restraint, the respondent was deprived of an opportunity to appeal his conviction to the Supreme Court of Indiana; and that the denial constituted a violation of equal protection of the law as guaranteed by the federal Constitution. (Record, pp. 20 to 27, inclusive.)

To respondent's petition, petitioner addressed a motion to dismiss in which petitioner asserted that the petition showed on its face various matters which precluded the respondent from a right to relief by habeas corpus. Also, in the motion to dismiss, the petitioner contended that all *questions of fact* concerning whether or not the acts of the

prison warden and other officials deprived the respondent of his right to appeal, were decided adversely to the respondent by the Supreme Court of the State of Indiana, and that the whole matter is res judicata. (Record, p. 28.)

The District Court overruled the motion to dismiss and after a hearing came to the conclusion that the respondent's allegations were true, and that he had been prevented from sending out appeal papers. The court believed that, because of said facts, the respondent's further imprisonment was illegal. For this reason, and on the authority of *Cochran v. Kansas* (1942), 316 U. S. 255, 86 L. Ed. 1453, 62 S. Ct. 1068, the District Court ordered that Cook be discharged. (Record, pp. 178 to 183, inclusive.)

Petitioner appealed to the United States Court of Appeals for the Seventh Circuit; after oral argument, that court (by a two to one decision) affirmed the judgment of the District Court and rendered its opinion on February 7, 1950. Judge Kerner dissented. (Record, pp. 203 to 210, inclusive.)

Of the judgment rendered by the Circuit Court of Appeals, the petitioner, Alfred F. Dowd, requested a review by this Honorable Court on writ of certiorari.

ASSIGNED ERRORS

The Circuit Court of Appeals by affirming the judgment of the Federal District Court erroneously decided the four questions presented herein. (This brief, p. 2.)

SUMMARY OF ARGUMENT

1. The first question presented was answered in the affirmative by the decision of the Federal District Court and the Circuit Court of Appeals. The decision decided that where an appeal is temporarily denied, the right to appeal is not suspended; the effect of denial is permanent and the State is forever precluded from restoring the right. We believe that this decision constitutes a misapplication of the equal protection clause of the federal Constitution. The respondent's allegations were to the effect that he was prevented for a period of time from sending out his appeal papers and that this disability commenced immediately after his incarceration in 1931. The record discloses that the disability (if any) was removed not later than 1933. That the respondent knew of this removal of disability is apparent from the record of testimony and from the fact that he prepared and filed a coram nobis petition in the original trial court in 1937. If the respondent was prevented from sending out appeal papers, the statutory time for perfecting an appeal admittedly would not run during the entire period of disability. In other words, equal protection of the law was not denied to him but was suspended during this period. When the warden removed the disability, the right to an appeal was restored to petitioner and the statutory time for taking an appeal began to run. Petitioner failed to appeal during said statutory period, and consequently waived his right to do so.

2. The effect of the decision of the Federal District Court, as affirmed by the Circuit Court of Appeals, is to grant an unlimited time for taking an appeal to any prisoner finding himself in the same situation as this respondent. This is in direct contravention of the statutes of Indiana governing jurisdiction of appeals. Instead of

receiving equal protection of law, as guaranteed by the Fourteenth Amendment, this respondent, and others similarly situated, receive special consideration and favored treatment. Such favor is in effect a grant of freedom. Witnesses scatter and die; records are destroyed; a second conviction becomes impossible. The very purpose of a statute limiting the time for an appeal is defeated.

3. The third question presented was decided in the negative by the decision of the Federal District Court and by the Circuit Court of Appeals. We believe that the Federal District Court in hearing evidence, and determining the same *questions of fact* as were presented to the Indiana Supreme Court, exercised an appellate function and reviewed and reversed a decision of the Indiana Supreme Court. We concede that the Federal District Court would not be bound by a determination by the Indiana Supreme Court of a question as to whether or not certain facts constitute a violation of a Federal Constitutional right. A determination of this legal question by the Indiana Supreme Court would not constitute res judicata of the particular question so as to preclude a Federal District Court from determining the same *legal* question. However, in the instant case it is conceded that the facts, if true, would constitute a violation of a federal constitutional right. The issue which was presented to the Indiana Supreme Court for its determination was one of fact. The respondent's allegations were denied by the State and a hearing by affidavit was held to determine the truth or falsity of the allegations. After receiving evidence by both parties, the Indiana Supreme Court denied the respondent's petition. This judgment of the Indiana Supreme Court constituted a determination of a factual question and not a legal question. We strongly contend that this decision of the Indiana Supreme Court should constitute

res judicata on the questions of fact raised and the Federal District Court should not have assumed jurisdiction and heard evidence, and substituted its judgment for that of the Indiana Supreme Court by making a finding on the exact same questions of fact.

4. The fourth question presented was answered in the affirmative by the decision of the Federal District Court and the Circuit Court of Appeals. Judge Kerner based his dissent on this question. He stated that under the circumstances of this case respondent is not entitled to the extraordinary remedy of complete freedom by habeas corpus.

Respondent was tried and convicted of murder. In the trial he was represented by two attorneys of his own choosing. Respondent had a jury trial and the court heard respondent and other witnesses. After his conviction, respondent's attorneys prepared and filed a motion for new trial, which was overruled by the trial court.

In his petition for a writ of habeas corpus addressed to the Federal District Court, the petitioner made no attack upon the validity of the judgment convicting him of murder. His allegations concerned matters which occurred subsequent to the judgment. If the respondent had been successful in persuading the Indiana Supreme Court that the facts alleged by him were true, he would have been afforded the remedy of an appeal. However, the Federal District Court after assuming jurisdiction, hearing evidence, and deciding that the respondent's allegations were true, could afford the respondent only one remedy, and that was the extraordinary remedy of complete freedom from an unquestioned, valid judgment of conviction. We believe that under the circumstances of this case the Federal District Court should not have assumed jurisdiction when the only

remedy it could afford was so extraordinary. By the "circumstances of this case" we mean: (A) the Indiana Supreme Court had already had the same issues of fact before them and rendered a decision adversed to the respondent; (B) even if the alleged facts were true and resulted in a violation of the equal protection clause of the constitution, said violation was only temporary, and equal protection was subsequently restored.

ARGUMENT

I. The following argument is based on the first of four questions presented herein.

Assuming, but not conceding, that prison officials under Warden Daly prevented the respondent from sending out appeal papers during 1931 and 1932, the respondent was not denied equal protection of the law as claimed by him. The record in this case discloses that the respondent was imprisoned in 1931 (Record, p. 4), and that Warden Daly's tenure as warden expired in June, 1933. (Record, p. 35.) Mr. Kunkel served as warden from June, 1933, to May, 1938. (Record, p. 158.) The record further discloses that in 1933 Warden Kunkel called a meeting which was attended by all inmates of the prison except those who were ill or insane and promulgated the rule that any prisoner who desired to do so could send any writing to any court or any lawyer as a special letter at any time. (Record, pp. 157, 158.) There is no contention and no evidence whatsoever of any restriction on the sending of papers to courts or to lawyers from the time of Warden Kunkel's meeting in 1933 until the present date.

While it is true that the respondent testified that he did not attend Warden Kunkel's meeting, he did state that he learned of the rule promulgated at said meeting. Respondent testified that he learned that Mr. Kunkel permitted papers to go out. (Record, p. 85.)

Cook's sister, Florence Cook, called on his behalf, testified on cross-examination that Cook wrote to her in 1933; that he could prepare papers; and that he then began preparing the evidence; that some of the affidavits used when the petition for error coram nobis was filed in 1937 were

signed in 1934; that they took some years to get the things ready; and that they had the assistance, at different times, of several attorneys. (Record, p. 58.)

It is also to be noted that the respondent must have been aware that he was not restricted from sending out papers, because the record shows that Cook did prepare and mail a coram nobis petition as early as October, 1937. (Record, p. 204.)

We believe that the respondent was not denied equal protection of the law. The right to appeal is not a constitutional right, but a statutory one. Since appeal is a statutory right, all are entitled to it, and to deprive anyone of the right would constitute a denial of equal protection of the law. In the instant case even if Cook was prevented from 1931 to 1933 from sending out appeal papers he was not denied equal protection of the law. This is true because, if he was so prevented, the time limitation for taking an appeal would not be running against him during the entire time he was under this disability.

However, the restriction if it did exist, was removed and Cook was then no longer under disability. The time limitation for taking an appeal at that time was six months. This six months' period started to run either on the day that Warden Kunkel removed the alleged restriction (in 1933) or when Cook first had knowledge that the restriction was removed. When the time did start to run Cook was entitled to a six months' period in which to seek an appeal, the exact time allowed to every other convicted prisoner. Whether this time started to run when Warden Kunkel lifted the restriction or when Cook first had knowledge of that fact, is immaterial. The six months' period, computed from the time Kunkel lifted the restriction, expired some time in 1934. Cook made no attempt to appeal during

that time. We do not know the exact date when Cook first became aware of the fact that the alleged restriction was removed and that he was no longer under disability, if he ever was, but we do know that the respondent prepared and sent out a petition for writ of error coram nobis in October, 1937. Therefore, he knew at that time that he was under no disability. If the time is computed from October, 1937, the time for appeal would have expired in 1938, and Cook made no attempt to take any appeal until 1946.

If Cook was under a disability, the time for taking an appeal would begin to run on the day that said disability was removed or knowledge of the removal came to be known to him. On that day Cook would occupy the same status relative to appeals, as a prisoner who was convicted on that same day; each would have exactly six months in which to take an appeal. It is a matter of common knowledge that most prisoners do not appeal from their convictions; when they do not appeal within the time provided for so doing they waive their right to do so.

The protection of constitutional rights both Federal and State may be waived by an accused, so long as the waiver is not against public policy.

Adams v. United States ex rel. McCann (1942), 317 U. S. 269, 275, 87 L. Ed. 268, 63 S. Ct. 236;
Schick v. United States (1904), 195 U. S. 65, 72, 49 L. Ed. 99, 24 S. Ct. 826;
Brown v. State (1941), 219 Ind. 251, 261, 37 N. E. (2d) 73.

Assuming that the State prevented Cook from taking an appeal, the prevention does not constitute a denial of equal protection of the law because the right to appeal was subsequently restored. The State of Indiana, assuming that

Cook was restrained, did no more than temporarily *suspend* Cook's right to appeal. However, his right was restored to him and respondent was permitted a full six months' period in which to perfect an appeal; a period of time equal to that afforded any other prisoner, and Cook, by not seeking an appeal, waived his right to do so.

II. The following argument is based on the second of the four questions presented herein.

The decision of the Federal District Court and the Court of Appeals has the effect of informing the State of Indiana that it owed Cook the opportunity to perfect an appeal, and that the temporary failure to allow the appeal resulted in a permanent denial of equal protection under the Constitution. If this were so, the respondent would have considerably more than equal protection of the law; he would be in a particular position of favor.

The effect of this decision is to grant the respondent and others similarly situated, unlimited time for taking an appeal; while all other prisoners must appeal within a certain limited time, or they are deemed to have waived their right to do so. This effect permits prisoners in respondent's situation to wait until witnesses have died and evidence has been destroyed before taking their appeal. Such favored treatment is tantamount to a grant of freedom, because in most criminal cases, witnesses scatter, memory dims, and evidence disappears after a lapse of many years. A conviction on a retrial under such circumstances is in most cases a practical impossibility. The very purpose of a statute which limits the time for taking appeals is defeated by this decision.

III. The following argument is based on the third of the four questions presented herein.

The questions of fact presented by the respondent, to the Federal District Court, in his petition for habeas corpus, are the exact questions which the respondent presented fo the Indiana Supreme Court for its determination. (Record, p. 117 et seq.) The Indiana Supreme Court heard the evidence by affidavits submitted by the respondent and by the State. Without rendering a written opinion concerning these questions, the Court denied the respondent's petition. Thereafter, the respondent petitioned for a rehearing in which he again presented these same questions, and the Indiana Supreme Court denied the petition for rehearing. (Record, page 134 et seq.) We believe that the Supreme Court of Indiana considered and adjudicated the merits of respondent's contentions which were fully set forth in his petition, and that the Indiana Supreme Court by denying his petition determined that the allegations thereof were untrue. This constitutes a determination of questions of fact and should, as to the facts determined, be res judicata. A petition for writ of certiorari was filed in this Court by the respondent, and said petition was denied. (*Cook v. State* (1947), 330 U. S. 841, 91 L. Ed. 1287, 67 S. Ct. 981.)

Since the Indiana Supreme Court has considered and adjudicated the merits of respondent's contentions, and this Court has declined to accept certiorari, a Federal Court should not reexamine these questions of fact in habeas corpus proceedings. This court has held that, where the state courts have considered and adjudicated the merits of a petitioner's contentions, and the United States Supreme Court has either reviewed or declined to review the decision of the State Court, a federal court will ordinarily not

reexamined, upon a writ of habeas corpus, the questions thus adjudicated.

Ex parte Hawk (1944), 321 U. S. 114, 118, 88 L. Ed. 572, 64 S. Ct. 448;
Salinger v. Loisel (1924), 265 U. S. 224, 230, 232, 68 L. Ed. 989, 44 S. Ct. 519;
White v. Ragen (1945), 324 U. S. 760, 764, 89 L. Ed. 1348, 65 S. Ct. 978.

By assuming jurisdiction and determining the case, under the circumstances of this record, the District Court actually reviewed the case decided by the Indiana Supreme Court, as though the respondent had appealed.

The respondent concedes that a Federal District Court has the right to hear a case to determine if a Federal Constitutional right has been violated, and the Court has this right regardless of whether or not a state court has already adjudicated the same issue.

Knewel v. Egan (1925), 268 U. S. 442, 445, 69 L. Ed. 1036, 45 S. Ct. 522;
Collins v. Johnston (1915), 237 U. S. 502, 505, 59 L. Ed. 1071, 35 S. Ct. 649;
Frank v. Mangum (1915), 237 U. S. 309, 59 L. Ed. 969, 35 S. Ct. 582.

However, we believe that this right of the Court extends only to a determination of a legal question as to what constitutes a violation of a Federal Constitutional right.

It has been held by this Court in such a case that, although the legal doctrine of res judicata does not apply, so as to deny consideration by the federal district court in a habeas corpus proceeding; where a ruling of state court

on a federal constitutional question is being examined by the federal district court, the decision of the state court cannot be ignored or disregarded.

Frank v. Mangum (1915), 237 U. S. 309, 59 L. Ed. 969, 35 S. Ct. 582.

To illustrate the above, we believe that in a case where the state court admits that a prisoner's factual allegations are true, but holds that said facts (even though true) do not constitute a violation of a Federal Constitutional right, a Federal Court would have the right to make its own determination as to whether or not the admitted facts did constitute a violation of a Federal Constitutional right. The question then would be simply a legal one and the prior state court's determination would not render said question res judicata.

However, in a case where the state court admits that the facts of a prisoner's allegations, if true, constitute a violation of a Federal Constitutional right and then accepts jurisdiction to hear the facts, and determines that the facts are not true, a Federal Court should not be permitted to exercise jurisdiction to hear the same evidence and determine whether or not in its opinion said facts are true. The trial of the facts by a state court of competent jurisdiction should constitute a final determination of the truth or lack of truth of a prisoner's allegation and the factual questions decided should then be res judicata.

In the instant case it is admitted that the facts as alleged by Cook would, if true, constitute a violation of the equal protection clause of the federal Constitution.

Cook previously presented the same factual questions as were presented in the Federal District Court to the

Indiana Supreme Court in a petition for a delayed appeal. (Record, p. 117.) The Court ordered the case heard by affidavit; the petitioner submitted affidavits in support of his allegations and the Attorney General of Indiana submitted affidavits in opposition to said allegations. The Court denied Cook's petition without rendering a written opinion thereon. (Record, p. 173.) The respondent sought to have this decision of the Indiana Supreme Court reviewed by this Court on a writ of certiorari. This Court denied certiorari and at the same time denied an application by the petitioner for a writ of habeas corpus.

Cook v. State of Indiana (1947), 330 U. S. 841, 91 L. Ed. 1287, 67 S. Ct. 977.

Since it is admitted that the allegations, if true, would constitute a violation of a Federal Constitutional right, and the Indiana Supreme Court heard evidence as to the truth or falsity of the allegation and then denied Cook's petition, it can be concluded that the Indiana Supreme Court decided that the facts as alleged by Cook were untrue. As stated before we believe that a determination of *a factual question* by a state court of competent jurisdiction should constitute res judicata on the issue as to whether or not said facts are true. The Federal District Court should not have heard evidence upon and determined the exact same factual questions as were determined by the Indiana Supreme Court.

It is to be noted that the case of *Cochran v. Kansas* (1942), 316 U. S. 244, which was relied on by the Federal District Court and the Circuit Court of Appeals, is clearly distinguishable from the instant case. In the Cochran case the same general allegations concerning conduct by prison officials in preventing an appeal by a prisoner were made.

However, in that case the Attorney General of Kansas defended on a technical interpretation of the word "record". Cochran's allegations (which were substantially the same as Cook's) were not denied by the Attorney General and no direct evidence or affidavits were submitted in opposition. In other words, in the Cochran case the allegations were never put at issue and no hearing was ever had thereon. The case was before this Court on direct appeal from the Kansas Supreme Court and this Court remanded the case to the State of Kansas with instructions to hear and determine the questions of fact which were raised. In the instant case Cook's allegations were put at issue by a denial, a hearing by affidavits was had thereon, and a determination of the case made.

IV. The following argument is based on the fourth of four questions presented herein.

Judge Kerner dissented from the majority opinion of the Circuit Court of Appeals and in said dissent stated as follows:

> "I can not agree that a prisoner whose guilt was established by a regular verdict and who has made no contention that the judgment finding him guilty of murder was void, should escape punishment under the facts in this case."

The Federal District Court and the Court of Appeals relied on the case of *Cochran v. Kansas*, 316 U. S. 244, in deciding this question. It is believed that the Cochran case is not an authority applicable to this case. This Court received the Cochran case on a direct appeal from the Supreme Court of the State of Kansas, and after exercising its power of review, remanded the case back to the Kansas Supreme Court.

The instant case represents an entirely different situation. The Federal District Court is not a Court of review and had no authority to remand this case back to the Indiana Supreme Court. The Federal District Court has afforded the petitioner the extraordinary remedy of complete freedom in spite of the fact that there has been no contention by anyone concerned that respondent's conviction of murder was invalid in any respect.

An examination of the record shows that Cook testified that he had been represented by counsel and had had a jury trial; that during the trial he himself had testified and that witnesses had testified on his behalf (Record, pp. 78-79); and that his attorneys had submitted instructions and argument to the jury (Record, p. 92); and that his attorneys had filed a motion for new trial on his behalf (Record, p. 89).

It can be readily seen by the above that a factual determination by the Indiana Supreme Court in favor of Cook would have had a far different result from the same factual determination made by the Federal District Court. If the Indiana Supreme Court had decided that Cook's allegations were true and that he had not waived his right to an appeal, that court could have granted a delayed appeal. A determination of the facts in Cook's favor on appeal would not have resulted in complete freedom. The Federal District Court had no authority to grant a delayed appeal; and when it undertook to permit Cook to again present the same evidence which he had already presented to the Indiana Supreme Court, the Federal District Court, by determining the facts differently from the determination made by the Indiana Supreme Court was forced to give Cook his freedom. Under such circumstances the Federal District Court should never have accepted jurisdiction.

Even if the facts alleged in Cook's petition for habeas corpus were true and resulted in a violation of the equal protection clause of the federal Constitution, said violation was only temporary, and was subsequently restored. (This point was fully developed in paragraphs one and two of our Argument.) Under these circumstances, the respondent was not entitled to his freedom and the Federal District Court should have denied the respondent's application for writ of habeas corpus.

CONCLUSION

For each and all of the above reasons petitioner believes that the decision of the Federal District Court and of the Circuit Court of Appeals was erroneous and it is respectfully submitted that said decision should be reversed.

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Deputy Attorney General,

Merl M. Wall,
Deputy Attorney General,

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Indianapolis, Indiana,
Attorneys for Petitioner.

IN THE

Supreme Court of the United States

NO. 66

OCTOBER TERM, 1950

ALFRED F. DOWD, AS WARDEN OF THE INDIANA STATE PRISON,
Petitioner

vs.

UNITED STATES OF AMERICA, ex rel.,
LAWRENCE E. COOK,
Respondent

WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

WILLIAM S. ISHAM,
Attorney for Respondent

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CITATIONS

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Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the United States Circuit Court of Appeals in this case is set out in the record at pages 203 to 209 thereof and is officially reported in 180 Fed. (2d) 212.

JURISDICTION

The respondent raises no question as to the jurisdiction of this Court in this action.

QUESTIONS PRESENTED

Under this heading of his brief, the petitioner has recited his contentions in the form of four enumerated questions. The first of these really consists of two questions: 1. (a) Is a person confined in prison under a judgment of conviction, who has been *temporarily* restrained by the state from exercising his right of appeal, denied his constitutional right of equal protection under the Fourteenth Amendment?

In answer to this contention respondent maintains that the denial of equal protection was not temporary; that it continued from the time of Cook's incarceration until today.

(b) Even though the restraint extends beyond the statutory period (one hundred eighty days after overruling motion for new trial), during which time he has the right to appeal, does he waive his constitutional right by failing to appeal within one hundred eighty days after the restraint is removed?

In answer to this contention, respondent maintains that there was no waiver of his right of equal protection because:

(a) His right to appeal was in fact never restored;

(b) His right to appeal was fixed within one hundred eighty days of the overruling of his motion for a new trial and, therefore, could never be restored after the lapse of this time;

(c) He had no knowledge at any time that his right to appeal was restored in any manner.

2. Assuming the respondent's rights are in a state of suspense during the period of restraint, and that subsequently the restraint is removed, when does the one hundred eighty day period for appeal commence to run; when the restraint was removed, or when the respondent had knowledge of the fact?

To this contention respondent maintains:

(a) That this is purely collateral to question 1 (b);

(b) Whether or not the right of appeal was restored at any interval is a non-federal question and has never been so decided by the courts of Indiana, but upon the contrary, has been adversely decided to the contention of petitioner.

(c) That knowledge of the fact that the restriction on sending out appeal papers had been lifted after the statutory time for appeal had elapsed was not knowledge that Cook had the right to appeal and hence the time element raised by this question is wholly immaterial.

3. Was the determination of fact made by the Supreme Court of Indiana on respondent's petition for an appeal, filed fifteen years after his conviction, conclusive on the District Court in hearing evidence on the petition for habeas corpus? Was it res adjudicata? To this question respondent maintains:

(a) That the doctrine of res adjudicata is not applicable to denials of petitions for habeas corpus.

(b) That even if it were, there was neither identity of parties or issues in the petition for appeal before the Supreme Court of Indiana and the habeas corpus proceeding before the District Court.

(c) That the hearing on Cook's petition for a belated appeal was not a full and fair adjudication of the federal contentions.

4. Is respondent, imprisoned under a valid judgment of a State Court, entitled to freedom in habeas corpus proceedings in a Federal Court because of a constitutional denial after the judgment?

To this contention respondent maintains that matters occurring after a judgment of conviction in a State Court, which constitutes a denial of equal protection under the Fourteenth Amendment, render the detention illegal and the prisoner entitled to release after exhausting all state remedies in vain.

STATEMENT OF THE CASE

In order to more clearly present the issues, and because of the fragmentary statement in the brief of petitioner, the respondent deems it proper to make his statement of the case.

The respondent, Lawrence Cook, then twenty-one years old, was convicted of murder in the Jennings Circuit Court of Indiana on the 23rd day of July, 1931. On the day after his conviction he was taken to the Indiana State prison. R.p. 178, 179. His motion for a new trial, timely filed, was overruled on October 16, 1931. R.p. 64.

Under the law in Indiana all convicted persons had the absolute right to appeal from criminal convictions within one hundred eighty days from the time of the overruling of their motion for a new trial.

Prior to the time of Cook's incarceration, and continuously throughout the period of his tenure, Daly, the warden of the prison had in force a rule that no prisoner was permitted to send out any legal papers of any sort, including papers relating to appeals. R.p. 34, 35, 36, 48, 52, 56, 66. Shortly after Cook was thus imprisoned, he, with the aid of other prisoners, prepared various legal papers relating to an appeal of his case. These consisted of a petition in forma pauperis for an attorney to represent him on appeal, a petition to have the county furnish him a transcript for appeal, a notice to the prosecuting attorney of his intention to appeal, a praecipe for transcript, an assignment of errors to be used in the appeal and a memory transcript of the evidence. R.p. 66.

These papers were completed long before the one hundred eighty day period for an appeal had passed. R.p. 66, 67. Numerous efforts were made during this time to get the papers sent out of the prison to the proper persons but always Cook was thwarted by the rule against such action.

The time fixed by statute during which Cook had the right to appeal expired on April 15, 1932.

There was no change in the prison rule suppressing papers until sometime after Warden Kunkel supplanted Warden Daly in June, 1933. R.p. 158.

Shortly after Warden Kunkel took office he changed the rule so as to permit prisoners to send out appeal papers and called a meeting so to inform them. This was sometime after June, 1933, and not less than fourteen months after Cook's time for appeal had elapsed. R.p. 158.

Cook testified that he did not remember attending the meeting where it was announced that the rule had been changed but that sometime later he did learn that legal papers could then be sent out. R.p. 69. He then believed, as do his counsel presently, that his *right* to take an appeal from the judgment of his conviction had been irretrievably lost. R.p. 70.

Cook then started preparing papers incident to a petition for a writ of error coram nobis in the Jennings Circuit Court. This was accomplished in 1937. After having the writ granted by one judge, subsequently denied by another, and after appealing to the Supreme Court of Indiana and filing a mandamus action there, all unsuccessful—this phase of his litigation was terminated in March, 1944.

In April, 1945, Cook filed a petition for habeas corpus under the Indiana Statute in the LaPorte Circuit Court of Indiana. This was denied by said court, after examination and without hearing evidence. From this decision Cook appealed to the Indiana Supreme Court. The judgment was affirmed in the case of *State ex rel Cook v. Howard*, 223 Ind. 694; 64 NE 2d 25, on December 13, 1945. In this decision, which turned on jurisdictional grounds, the Supreme Court, for the first time in its existence, announced a new principle relating to appeals, as follows:

> "In aid of its appeliate powers and functions this Court has both inherent and statutory power to entertain and determine a petition to appeal after the time allowed by statute therefor has expired, under the conditions set forth in paragraph one of appellant's complaint, Section 3-2201,

Burns, 1933, but the LaPorte Circuit Court, is without jurisdiction so to do in this action."

A petition for certiorari addressed to this Court was denied on April 22, 1946.

On September 13, 1946, Cook filed a petition in the Supreme Court of Indiana to appeal his original judgment of conviction in response to the language of that court in his habeas corpus case above cited. He made the State of Indiana a party, alleging the facts of the restraint of the prison authorities as here, and supported his allegations by affidavit. To this petition the State filed answer and counter-affidavits. Cook then filed reply and additional affidavits.

Without hearing any witness, without any cross-examination, but only after examination of the papers then filed, the Supreme Court of Indiana on November 26, 1946, denied Cook's petition in an order book entry in the following language:

> "The Court having examined and considered said petition, the answer thereto, and petitioner's reply and all of said affidavits and being duly advised in the premises, finds that the basic allegation of said petition, to-wit: That petitioner's counsel refused, without pay, to take an appeal is not true; and that petitioner is entitled to no relief herein." R.p. 173.

Cook then filed a petition for rehearing which was denied on the 17th day of December, 1946. R.p. 176.

He then filed a petition for certiorari in this Court which was denied March 17, 1947.

On November 13, 1947, he filed his original petition for habeas corpus in the United States District Court which was dismissed by that Court on motion of the petitioner here, and after leave, he filed his amended petition for habeas corpus on October 22, 1948. A motion to dismiss was overruled.

The petitioner here, filed answer and return. This pleading has been omitted in the record filed in the United States Circuit Court of Appeals and in this Court. A copy is made a part of the appendix to this brief. Post p. i.

On the issues thus formed the cause was tried by the District Court which made a finding for Cook and ordered his release. At the time of his release, Cook had been imprisoned 17½ years.

An appeal was duly perfected by the petitioner here and the United States Circuit Court of Appeals affirmed the judgment of the District Court.

For convenience a chronological outline of the facts is set out in the appendix of this brief. Post p. iii.

SUMMARY OF ARGUMENT

Respondent was convicted of murder by State Court. Immediately after conviction he was taken to the State prison where he was confined for seventeen and a half years. Under the law he had a right to appeal from his conviction within one hundred eighty days from the overruling of his motion for a new trial. Within the time allowed and with the aid of fellow-prisoners he prepared appeal papers and petition in forma pauperis for an attorney to represent him on appeal, and also a petition for transcript to be paid for by the State. During all the time allowed for appeal there was a rule at the prison against sending out such papers. As a result he was thwarted in getting papers to proper persons and thereby lost his right of appeal. This right in Indiana is a substantial right fixed by law. All State remedies were exhausted and no question is presented on this issue. No question as to the sufficiency of evidence to sustain the District Court's finding of facts is raised. Under *Cochran v. Kansas*, 316 US 255 and *Ex parte Hawk*, 321 US 114, Cook was released.

Relating to questions 1 and 2 raised by petitioner: After the one hundred eighty day period expired Cook's right to appeal was lost. The right to send out papers after the statutory period elapsed did not revive the right to appeal. Even if the right to appeal was revived, Cook did not waive the constitutional guarantee because he had no knowledge that the right to appeal was restored. Actual, not constructive knowledge is necessary to constitute waiver. The

right to appeal cannot be carved out of any one hundred eighty day period of his imprisonment but commences from the overruling of his motion for a new trial. There was no temporary suspension of his constitutional rights. There was a permanent deprival thereof.

Relating to question 3 raised by petitioner: To contend that the United States District Court was bound by the findings of fact of the State Supreme Court in Cook's petition for permission to appeal is simply effort to adopt to habeas corpus the principal of res adjudicata. Res adjudicata does not apply to habeas corpus. The Court made but one specific finding, —that the basic allegation of the petition, to-wit: That Cook's counsel did not refuse to take an appeal because they were not paid, was not true. This fact is not germane to constitutional question and no other finding was specifically made by the Court. It cannot be assumed that constitutional facts were found against Cook by the Indiana Supreme Court. This proceeding was purely discretionary and non-federal in scope. There was no consideration and adjudication on the merits of his contentions raised in his habeas corpus proceeding. The petition for appeal did not constitute a full and fair adjudication of the federal contentions raised, inasmuch as the matter was purely discretionary in the Court, non-federal in scope, was heard on affidavits exclusively and the Supreme Court of Indiana did not treat the proceeding as any determination of constitutional rights. No written opinion on each question raised by the record, as required by the State Constitution, was made. There was simply an unpublished order book entry in which the Court itself characterized his petition as being for "permission" to appeal.

Relating to question 4 raised by petitioner: Under *Cochran v. Kansas*, 316 US 255, Cook was entitled to freedom upon establishing the allegations of his petition for habeas corpus in the Federal Court. Judge Kerner's dissenting opinion was based on the premise that the State habeas corpus proceeding and the pe-

tition for permission to appeal, fully and completely raised the constitutional questions, and that, therefore, after the denial of certiorari by this Court in each of said proceedings, the District Court should not have assumed jurisdiction. It is respectfully submitted that Judge Kerner erred in his conclusion that either of said proceedings constituted a full and complete hearing of the merits of his constitutional questions. The fact that release of the prisoner was the only remedy available in the United States District Court is no reason for denying that Court the right to hear and determine the merits of the petition.

ARGUMENT

Lawrence Cook proceeded in the United States District Court for the Northern District of Indiana in habeas corpus, seeking his release under a State conviction because his detention was unlawful and in violation of his rights guaranteed under the Fourteenth Amendment to the Federal Constitution—more particularly the equal protection of the laws clause thereof.

He relied primarily on the principles of law announced in the case of *Cochran v. Kansas*, 316 US 255, and the case of *Ex parte Hawk*, 321 US 114.

No question is presented here concerning the exhaustion of State remedies.

No question is presented here concerning the sufficiency of the evidence to sustain the findings of the District Court as to the fact of suppression by the prison authorities throughout the period of time during which Cook had the right to appeal.

The District Court, after hearing all the evidence, among other things, found:

> "Finally, a close analysis of the language in the *Cochrane* case indicates that the only test which the court may apply in a case of this kind is whether the petitioner has been arbitrarily deprived of a right accorded to all other persons in his circumstances in the State of Indiana."
>
> "In other words, the question is whether the petitioner

> has been the object of arbitrary, unreasonable, and oppressive discrimination by the officials of the State, so that his further incarceration is contrary to the prohibitions of the Fourteenth Amendment to the Federal Constitution. The conclusion of the Court is that he has, and that the arbitrary suppression of the papers which he had prepared in an attempt to perfect an appeal was contrary to the Equal Protection Clause of the Fourteenth Amendment." R.p. 181. 182.

This finding is in no way attacked by the petitioner. The United States Circuit Court of Appeals in its opinion confirmed the finding of the District Court as follows:

> "Based upon substantial evidence herein, the district court found that petitioner was deprived by officials of the State of Indiana of his right to appeal his conviction. The Court also properly found that the petitioner has exhausted his State remedies." R.p. 207, 208.

The rights given the citizens of Indiana under our laws which Cook was denied protection of by the prison authorities, are as follows:

1. The right to file his petition in the Court where his case is pending to determine whether or not he is without financial means to employ counsel, and if so, to provide him with counsel at State expense. This right is provided by statute as follows:

> "*Poor person, attorney for.*—Any poor person not having sufficient means to prosecute or defend an action may apply to the court in which the action is intended to be brought, or is pending, for leave to prosecute or defend as a poor person. The court, if satisfied that such person has not sufficient means to prosecute or defend the action, shall admit the applicant to prosecute or defend as a poor person, and shall assign him an attorney to defend or prosecute the cause, and all other officers requisite for the prosecution or defense, who shall do their duty therein without taking any fee or reward therefor from such poor person." Burns Ind. Stat. 1933, Sec. 2-211.

In the case of *State v. Spencer*, 219 Ind. 148; 41 N.E. 2d 601, 602, the Court said:

> "In State ex rel White v. Hilgemann, Judge, Ind. Sup.

1941, 34 N.E. 2d 129, we held that under section 13 of article 1 of the Constitution of Indiana the court is required to furnish a pauper defendant with a record which may be used to support an assignment of error on appeal, and furnish him with counsel to perfect an appeal, all at the expense of the county. This was upon the theory that due process requires a fair trial, free from prejudicial error, and the right to a review to correct errors.

"But after there is a final judgment unappealed from, and the time for asserting error has passed, the criminal prosecution in which the accused is entitled to be heard by himself and counsel is terminated, and the constitutional provision is no longer operative."

In *State ex rel White v. Hilgemann,* 218 Ind. 572; 34 N.E. 2d 129, 131, the Court said:

"From what has been said, we must conclude that one accused of crime has the right to be provided with counsel literally 'at every stage of the proceedings,' including the proceedings by which he may seek a review for error by appeal."

2. The right to file a petition in the Court where his case is pending to determine whether or not he is without financial means to have a transcript of the evidence furnished for an appeal, and if so, to have the reporter make such transcript at State expense.

The right is provided by statute, see Burns Ind. Stat. 1933, Sec. 4-3511. (A copy of this statute appears in this brief at post p. ii.

That rights 1 and 2 above enumerated were no hollow rights is apparent from undisputed evidence in the case and not contested by the petitioner. The respondent testified that he and his family were without financial means during the critical time. R.p. 65. Also, Florence Cook, sister of respondent, testified that they were without funds at that time and that, in fact, the attorney's fees for defending her brother in the trial court were collected only by foreclosure of a mortgage on their home. R.p. 62.

3. That the right to review a conviction on appeal is a substantial right in Indiana is shown by the following quotation:

> "Until a person accused of crime has been convicted upon a trial free from error which prejudices his substantial rights, it may be said that he is presumed to be innocent and continues to be merely 'the accused' person referred to in section 13 of article 1 of the Constitution. After he has been convicted, and the judgment has become final, and it has been determined upon appeal that there was no prejudicial error in the trial, or when the time is past and the right to a review for error has been waived, the defendant is no longer 'the accused,' and the 'criminal prosecution' is ended. He then stands convicted, and must be presumed to be guilty unless and until he procures the judgment to be vacated." *State ex rel Cutsinger v. Spencer, Judge,* 219 Ind. 148; 41 N.E. 2d 601, 602, 603.

Also, the following excerpt from the case of *State ex rel White v. Hilgemann,* 218 Ind. 572; 34 N.E. 2d 129, 131:

> "But the mere naked right to a review for error and to have counsel is not sufficient. The right must be made available for the purposes for which it is granted. The right to a review is but a hollow grant to one who cannot provide himself, and is not provided, with counsel, learned and skilled in the law and therefore withholding counsel as a practical matter withholds the right to review, and hence to corrective judicial process, and hence to due process of law."

And further from the same case:

> "When a person is called upon to defend himself against a charge of crime he is presumed to be innocent until his guilt is proven. Our procedure for correcting error upon a trial is by appeal, and is not conditioned upon a preliminary showing of probable error. The reviewing court cannot see whether there is error until the appeal is perfected. It must be assumed that the trial court was not conscious of error or the error would have been corrected there. The review by appeal contemplates an examination of the record to discover whether there was error prejudicial to the defendant's substantial rights. This examination cannot be had until a proper record and a proper assignment of error and a proper brief are presented to this court. If a defendant is denied counsel he is effectively deprived of the right to review contemplated by both Constitutions."

There can be no question but that Cook was denied substantial

rights by the State of Indiana which rights were given to all of her citizens similarly situated. There can be no doubt but that Cook was denied equal protection of the laws of Indiana by the State of Indiana.

The petitioner in his brief admits this conclusion:

> "In the instant case it is admitted that the facts as alleged by Cook would, if true, constitute a violation of the equal protection clause of the Federal Constitution." Petitioner's brief, p. 15.

This is exactly the admission made by the attorney general of Kansas in the case of *Cochran v. Kansas*, 316 U. S. 255:

> "The State properly concedes that if the alleged facts pertaining to the suppression of Cochran's appeal papers 'were disclosed as being true before the Supreme Court of Kansas, there would be no question but that there was a violation of the equal protection clause of the Fourteenth Amendment.' "

Under the doctrine of *Ex parte Hawk*, 321 U. S. 114, the district court properly heard the petition for habeas corpus and under the evidence properly found a violation of the Fourteenth Amendment and under the law properly released the respondent.

Relating to Petitioners' Questions 1 and 2

The petitioner takes the position that Cook's right to appeal within one hundred eighty days after his motion for a new trial was overruled was only temporarily taken from him by the state and then later restored. He then contends that (a) the fact of the restoration of the right erases the fact of the denial of equal protection, and (b) that because, after the statutory time for appeal had expired the ban on sending out appeal papers was lifted, that Cook's time for appeal then commenced, and having run from that date without an appeal being taken, he had waived his constitutional right of equal protection.

A complete answer to both of these contentions is that Cook's *right* to an appeal was never restored. The statute in force at the time of Cook's entrance in prison and until 1937 was:

> "All appeals must be taken within one hundred and eighty days after the judgment is rendered, or in case a motion for a new trial is filed, within one hundred and eighty days after the ruling on such motion. The transcript must be filed within sixty days after the appeal is taken." Ind. Acts 1927, 421.

Every litigant in civil and criminal suits in Indiana has a *right* to appeal to obtain a review of the judgment rendered against him, so long as he conforms to the statutory requirements, of which the foregoing statute is one.

From the time of the enactment of appeal statutes the courts of Indiana have unbrokenly held that the appellate tribunal had no jurisdiction of an appeal that was taken too late. In this respect there was no distinction between appeals in civil and criminal judgments. *Winsett v. State* (1876) 54 Ind. 437; *Farrell v. State* (1882) 85 Ind. 221; *Farlow v. State* (1924) 196 Ind. 295; *Dudley v. State* (1928) 200 Ind. 398.

If Cook had had a law library available at the time his right to appeal became lost, and had looked up the most recent decision on the subject he would have read:

> "* * * * * * and where the transcript is not filed within sixty days after the appeal is so taken—the time provided by Sec. 16 Ch. 132, Acts 1927—the appellate court does not have jurisdiction of the appeal and it will be dismissed." *Mahoney v. State*, 203 Ind. 200, 204.

Counsel representing the petitioner have recently had occasion to obtain the benefit of this rule in the case of *Johns v. State*, ... Ind. ....; 89 N. E. 2d 281. This decision was handed down December 21, 1949:

> "It appears that this appeal was not perfected within the time allowed by the rule, and, as stated in Brady v. Garrison, 1912, 178 Ind. 459, 460: 'It has been uniformly held by the court that an appeal must be taken within the time allowed by statute, and that unless the transcript and assignment of errors are filed within that time there is no cause in this court. (Citing cases)'

It should be noted that in the above case a futile dissenting

opinion was rendered which included the following caveat:

> "The Indiana courts ought to wash their own judicial linen. It is the duty of this court to see that this is done. We should not leave without a state remedy, wrongs which will have to be corrected in the federal courts.
>
> * * * * * * *
>
> "Society suffers, respect for the law is weakened and public funds are needlessly expended when we deny relief for violations of due process, and force prisoners into federal courts for protection of their rights."

Thus it is manifest that once one hundred eighty days after overruling Cook's motion for a new trial elapsed, his *right* to an appeal forever vanished.

Counsel have completely confused the right to appeal with the right to send out appeal papers. This latter right was restored but only after the right to appeal was extinguished. It was a right which could be restored, the right to appeal was not. No case in Indiana is cited to support petitioner's claim that at any time after April 15, 1932, Cook had the right to appeal. There is no such authority.

In 1940, but not until then, there was developed a doctrine that notwithstanding a statutory curtailment, the Supreme Court, under the Constitution of Indiana, had the right to grant appeals regardless of statutory compliance. This right was in the court and not in the litigant.

The case which first brought forward this idea was in *Warren v. Indiana Telephone Company*, 217 Ind. 93. The Indiana Statute provided for appeals from the Industrial Board being taken to the Appellate Court of Indiana and made no mention of the Supreme Court. The Warren decision overruled former cases holding in effect that the Appellate Court was the court of last resort in compensation cases, saying:

> "It follows from what has been said that this appellant may not be denied his right to present his case to this court for review because the legislature has not provided a means for bringing it here."

In 1941 in *State ex rel White v. Hilgemann*, 218 Ind. 572, the Court, under the authority of the *Warren Case*, in granting mandamus requiring the trial judge to provide counsel for defendant on an appeal from a conviction, said:

> "* * * * The constitution of Indiana guarantees an absolute right to review by this court; that the legislature has the right to regulate and provide procedure for obtaining a review, but not to curtail or deny the right.
>
> * * * * * * *
>
> "This original action was begun within the time allowed for the filing of a bill of exceptions and for perfecting an appeal. There has been delay in determining the questions involved. The relator should not be prejudiced by this delay."

The time for perfecting the appeal was extended sixty days from the filing of the opinion.

The next case in Indiana touching the subject of an appeal after the statutory time had expired was the case of *State ex rel Cook v. Howard*, 223 Ind. 694, decided in 1945. In this case the respondent was the appellant. It was his appeal from an adverse ruling of the LaPorte Circuit Court on petition for habeas corpus filed in that court. The Supreme Court of Indiana affirmed on jurisdictional grouds. Among other things the Court said:

> "If appellant has been denied the privilege of appealing his case, by the warden and employees of the prison where he is serving, until the time allowed by statute for an appeal has expired, that fact would not nullify the judgment lawfully rendered against him by the Jennings Circuit Court. It would merely extend the time for appeal during the period of such disability. In aid of its appellate powers and functions this court has both inherent and statutory power to entertain and determine a petition to appeal after the time allowed by statute therefore has expired, under the conditions set forth in paragraph one of appellant's complaint. Sec. 3-2201, Burns' 1933, but the LaPorte Circuit Court is without jurisdiction so to do in this action."

It is apparent that the law in Indiana at this time was that under certain exceptional circumstances the Supreme Court had

the constitutional right to permit an appeal after the statutory time had elapsed. Manifestly, the petition contemplated would be determined as a matter of grace and not a matter of right in the litigant.

In 1947 the legislature enacted this rule in a statute:

> "9-3305. Supreme Court authorized to permit late appeals.—The Supreme Court of Indiana may, for good cause shown, under such rules as it may adopt or under such orders as it may make in a particular case, permit appeals from a judgment of conviction after the original time for taking an appeal has elapsed." Burns' Stat. 1933, 1949 Supp. P. 51.

Thus it appears that the first time the Indiana Supreme Court informed Cook or any other person in Indiana that any such proceeding as a petition for a belated appeal existed was in 1945, after Cook had been imprisoned for fourteen years. The ray of hope thus held out to Cook, however, was short-lived, as the Supreme Court promptly denied the petition after it was filed. Respondent believes that this long delayed gesture after fourteen years of imprisonment did not and could not nullify the denial of equal protection.

The restraint exercised by the prison authorities has been characterized by the petitioner "temporary." In fact and in effect it has been continuous since 1931 until Cook was released by the judgment of the District Court, during all of which time he was in confinement, a period of seventeen and a half years. This may be "temporary" in terms of geological eras but when measured in the span of human life it is nearly permanent.

The restoration of his right to appeal at the end of the period which was in fact denied him, still meant that he had served more than seventeen and a half years, whereas other citizens had a right to have their appeals determined in due course after they had been perfected under the statute.

Nothing the State could do at that late date would restore equal protection. The right to appeal within one hundred eighty days

does not mean that that period may be carved out of the middle or the end of a sentence being served. It commences with the overruling of the motion for a new trial.

Assume for the purpose of argument that Cook's right to appeal was, as a matter of law, restored upon lifting the restriction sometime after the statutory period had expired. The fact that he did not appeal within a one hundred eighty day period commencing some two years after the denial of his motion for a new trial would not in itself constitute a waiver on his part of the denial of equal protection. Waiver of a constitutional right has been defined as the intentional relinquishment of a known right. In *Johnston v. Zerbst*, 304 U. S. 458, 464, the Court said:

> "It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."

Cook testified he believed that after his statutory period for appeal had expired there was nothing further he could do about it. R.p. 70 Par. 120.

True, he knew he could send out legal papers fourteen months after the statutory appeal period had expired but he believed that his right to appeal had been lost. Knowledge on Cook's part that he could send out papers was not knowledge that he could take a belated appeal as a matter of right and could not constitute waiver of that right. The denial of equal protection was at that time an accomplished fact and Cook cannot be held with knowledge anticipating the decision in his case in 1945 to the effect that on petition the Court had the right to grant him a belated appeal as a matter of grace.

In short, the petitioner by his questions 1 and 2 seeks to have the Court hold that Cook waived his constitutional right of equal protection by constructive knowledge of a non-existent law.

Relating to Petitioner's Question 3

The position of the petitioner in this regard seems to be that (a) the Supreme Court of Indiana made a factual determination of the allegations of Cook's petition to appeal; (b) that, notwithstanding, the "Federal District Court has the right to hear and determine if a federal Constitutional right has been violated;" Petitioner's brief P. 14. (c) but that in so hearing and determining the petition the District Court was compelled to adopt the factual findings of the Supreme Court and could only determine the law as applied to those facts.

This contention has the sole merit of being novel. The result would be that the District Court would simply be a court of legal review. This is one of the very objections petitioner makes to the judgment in this case.

However you view this contention it requires the support of the doctrine of res adjudicata in habeas corpus. Res adjudicata does not apply to habeas corpus, and this is true whether it be in relation to the facts alone or the judgment of the Court. This matter has been decided and discussed so many times and so recently that the petitioner is compelled to admit it in his brief. Petitioner's brief, P. 14. *Darr v. Burford,* .... U. S. ...., 94 Law Ed. 511; *Waley v. Johnston,* 316 U. S. 101, 105.

In order to determine what facts were found by the Supreme Court of Indiana and hence what facts the District Court must adopt, the petitioner has been compelled to indulge in speculation in disregard of the words employed by the Supreme Court in its order denying the permission to appeal. The only language in this order relating to any finding of any fact alleged by Cook in his petition is as follows:

> "* * * * finds that the basic allegation of said petition, to-wit: That petitioner's counsel refused, without pay, to take an appeal is not true;" R.p. 173.

Thus, from the language of the order it appears first, the Court found that the "basic allegation" of the petition was the

motive of Cook's trial counsel in not taking an appeal for Cook, and second, the negative finding that that motive was not because of the fact Cook could not pay him. These are the only facts found by the Supreme Court, and even if the District Court had adopted them as found, it could not possibly have changed its finding on the constitutional issues to which these facts were not germane.

It is at this stage of his argument petitioner admits that if the allegations of Cook's petition for appeal or habeas corpus in the District Court were true, there was a denial of equal protection. Petitioner's brief, P. 16. He speculates from this premise that because the Supreme Court denied the petition for appeal it must have found all of the facts material to the constitutional question against Cook. This is definitely a non sequitor. Because of the wide divergence of scope presented by Cook's petition for permission to appeal and the petition for habeas corpus, it seems clear that even if res adjudicata did apply to habeas corpus, it would not be applicable in this case.

Counsel for petitioner further assumes that as a matter of fact the Indiana Court would have granted Cook an appeal if the facts alleged in the petition were found to be true. This is not the case. After all, it was still a discretionary matter and many facts not appearing on the petition or in the affidavits filed, could well have been the reason the court elected to withhold its grace. From the finding actually made it would appear that this was the case and that the Court was not particularly interested in the constitutional aspect, inasmuch as it made no mention of that issue and characterized another issue as the "basic allegation."

One of the affidavits filed by the State of Indiana in that proceeding was the affidavit of Virginia James, the official court reporter who reported the case in which Cook was convicted. In this affidavit she stated it was impossible for her to make a transcript of the evidence at that time because of lost exhibits and inability to then read her shorthand notes. This affidavit appears

in the record at page 137. The injection of this fact into that proceeding certainly had nothing to do with the constitutional question, and yet it might have been the very basis for the denial of the right to appeal.

It is significant that in two cases decided by the Indiana Supreme Court it was held where an appellant in either civil or criminal case cannot procure a transcript of the evidence for appeal because of inability of the official reporter to make the same, that fact alone is sufficient for the Supreme Court to grant the appellant a new trial. *Indianapolis Life Ins. Co. v. Lundquist,* 222 Ind. 359; 53 NE 2d 338; *State v. Bain,* 225 Ind. 505; 76 NE 2d 679.

Once the State of Indiana injected the issue of the inability of the court reporter to provide a transcript, the real question before the State Supreme Court was not whether Cook should be permitted a belated appeal but whether he should be permitted a new trial of his cause without an appeal. It might well have been the Court believed, as does the petitioner in this case, that "a conviction on a retrial under such circumstances is in most cases a practical impossibility." Petitioner's brief, P. 12.

If the Indiana Court decided Cook's petition for appeal "without opinion," as the petitioner characterizes that court's order, surely, under no circumstances, should the District Court be compelled to guess that the turning point of that decision was an adverse finding of facts on the constitutional question. Such a situation is even a stronger case than where this Court is compelled to speculate, on certiorari, the grounds of the State Court's decision. In the case of *White v. Ragen,* 324 US 760, it was held that in absence of specific grounds stated by the Illinois Supreme Court, it was not necessary in the exhaustion of remedies for a prisoner to even file for certiorari because presumptively the decision turned on a non-federal ground.

The respondent believes that the petitioner in his brief has restricted himself to the issue of whether or not the District Court, admittedly having a right to hear Cook's petition in habeas cor-

pus was bound by the finding of fact of the Indiana Supreme Court on the petition for appeal. However, in his brief the petitioner cites the case of *Ex parte Hawk* and states a proposition to the effect that where a state court has considered and adjudicated the merits of petitioner's contention, and this court has either reviewed or declined to review the decision, that a federal court will ordinarily not reexamine upon a writ of habeas corpus the questions thus adjudicated. We believe, notwithstanding petitioner's admission that the District Court had a right to hear and determine the petition for habeas corpus, further discussion of the exact nature of the petition for appeal as applied to the language in the *Hawk Case* should be made.

(a) The first judicial or legislative mention of a petition for a belated appeal came in Cook's own case in 1945. *State ex rel Cook v. Howard*, Supra.

(b) The granting or refusal of such petition was purely a matter of discretion in the Supreme Court. It afforded Cook no right, but merely an opportunity.

(c) There are no rules of court or statutes prescribing the procedure, manner of presentation, or defining any standard of reasons for the court's exercise of discretion.

(d) There is no rule of any kind which gives the petitioner the right to an appeal on any given set of facts, including facts which constitute a violation of the Fourteenth Amendment.

(e) The scope of the entire proceeding is necessarily non-federal in character.

(f) The Court itself did not treat the petition as any other case pending before it since it did not write an official opinion to be published along with all other official opinions, but merely recorded its action by an order book entry.

The Constitution of the State of Indiana, Article 7, Section 5, provides:

> "Decisions in writing.—The Supreme Court shall, upon the decision of every case, give a statement in writing of

each question arising in the record of such case, and the decision of the Court thereon." 1 Burns' R. S. 1933, P. 87.

In writing its order, the Supreme Court characterized the petition as being for *permission* to appeal as follows:

> "The petitioner having filed herein his verified petition for permission to appeal from a certain judgment * * *." R.p. 173.

In view of this constitutional provision and in view of the order book entry as made, it is doubly apparent that the Court itself treated the whole matter as being purely within its grace and not a controversy where legal *rights* of the petitioner were being asserted.

Thus viewing this proceeding it seems very clear that the language in *Ex parte Hawk* concerning a "full and complete hearing of his contentions" was never intended to apply to such a "hearing" as this was. The reasons for such a conclusion are many.

1. The proceeding relating to the discretion of the Indiana Supreme Court to permit an appeal after the statutory period had elapsed is purely non-federal in its scope. Therefore, on petition to this Court, certiorari would be denied and thus this Court would not have an opportunity to review under the existing principles of certiorari. Then if the Federal District Court were bound by facts relating to constitutional violation made by the Indiana Supreme Court, no Federal Court would ever have the opportunity of a full and complete hearing on a federal question. The State courts would then be the sole judges of the inhibitions placed on the States by the Fourteenth Amendment.

2. The language in *Ex parte Hawk* concerning a consideration and adjudication of the merits of his contentions by a State Court, could only apply to a proceeding in the state such as habeas corpus or coram nobis where the petitioner was asserting *rights* concerning the legality of his detention. As distinguished from such a situation Cook's petition for appeal was not the assertion of a legal right he then had, but was merely a recital of reasons seek-

ing to invoke the magnanimity of the Indiana Supreme Court to let him appeal. He was not demanding a right—he was asking a favor.

3. If this Court did not consider permission to appeal a non-federal question and granted certiorari and reviewed the decision of the Indiana Court in this proceeding; and if this Court concluded that equal protection of the laws had been denied Cook, what decision could it write compelling the Court of Indiana, contrary to its discretion, to grant Cook's appeal?

4. Did the language in *Ex parte Hawk* concerning a full and fair adjudication of the federal contentions raised, mean a proceeding involving a question of fact based solely on affidavits? We believe not. While we recognize the fact that federal courts are extreme reluctant to criticize procedure in a state court, yet the rule laid down in *Ex parte Hawk* related to federal procedure in that it discouraged federal courts from hearing habeas corpus when there had been a full and complete hearing in the state, etc. Surely no lesser hearing in the State Court should supplant the mandatory hearing in Federal Courts. In the case of *Walker v. Johnson*, 31 U. S. 284, the Court said:

> "In other circuits, if a issue of fact is presented, the practice appears to have been to have issued the writ, have the petitioner produced, and hold a hearing at which evidence is received. This is, we think, the only admissible procedure. Nothing less will satisfy the command of the statutes that the judge shall 'proceed to determine the facts of the case by hearing the testimony and arguments'."

The present federal statute clearly contemplates evidence, orally or by deposition, in both of which cases the right of cross-examination is preserved. In addition the Court, (meaning Federal Court), may in the discretion of the Judge receive evidence by affidavit where the right to propound written interrogatories of affiant is preserved. This statute certainly does not mean that some State Court could exercise *its* discretion in the use of affidavits which would bind the federal judge even though discretion directed him to avoid their use. U. S. C. A. Tit. 28, Sec. 2246.

5. Asking the Supreme Court of Indiana for permission to get into that court after the statutory right ceased, and asserting the right in the Federal District Court that he was wrongfully deained because his constitutional rights were violated are entirely different cases. The Supreme Court of Indiana was not bound legally or morally in the exercise of its discretion to permit Cook's appeal because his constitutional rights had been violated after his conviction. On the other hand the United States District Court, upon proof of Cook's constitutional rights being violated by the State of Indiana, was bound legally and morally to order his release.

It seems, therefore, that any interpretation of *Ex parte Hawk* which would deny the District Court the right to hear and determine both the facts and the law in Cook's petition for habeas corpus would in effect emasculate the Federal Courts from protecting the rights of citizens denied their constitutional rights.

6. In *White v. Ragen*, 324 U. S. 760, cited by petitioner, the Court in discussing the matter of exhaustion of State remedies as announced in *Ex parte Hawk*, confines the principle of "State adjudication on the merits" to habeas corpus proceedings in the State. If this doctrine were extended to proceedings in the State which were either discretionary under the law of the State or were purely non-federal questions where cartiorari would not be granted, an entirely new and undesirable result would be reached. In such case the decision of the State Court would be final as to federal constitutional questions and this Court would be automatically closed by its own certiorari rule. The Federal District Courts would likewise be closed "ordinary." Obviously the language in *Exparte Hawk* was never intended to be given such a strained construction which would reach so restrictive a result.

Also, the petitioner complains that the District Court in hearing and determining Cook's petition for habeas corpus, was improperly exercising the function of an appellate tribunal. Answer to this contention has been completely and recently made in the

dissenting opinion in the case of *Darr v. Burford,* .... U. S. ....; 94 Law Ed. 511:

> "Even though a petition for habeas corpus in a federal District Court may involve constitutional questions which were found against the petitioner by the highest court of his State, the District Court is not sitting as a court of review of the State Court. A petition for habeas corpus in a federal court, after the State process has been exhausted, 'comes in from the outside,' as Mr. Justice Holmes phrased it in his dissenting opinion in Frank v. Mangum, 237 U. S. 309 * * *, a view which established itself as law in Moore v. Dempsey, 261 U. S. 86 * * *. If it be suggested that as a matter of appearance, legal analysis apart, a federal District Court might be granting relief which the highest Court of the State had denied, the same unanalyzed appearance would attach to a District Court's granting relief after this Court had denied it."

Relating to Petitioner's Question 4.

It is the position of respondent that whenever substantial rights guaranteed a citizen under the Fourteenth Amendment are denied him by a State, and where he has exhausted all State remedies, that a Federal Court in habeas corpus has the right and duty to release him from confinement brought about by the denial of that right. It makes no difference whether the constitutional violation occurred before or after conviction. This is in substance the holding of the Court in *Cochran v. Kansas,* 316 U. S. 244. The right to equal protection does not cease after a conviction. There is no difference from releasing a prisoner unconstitutionally denied counsel *at* the trial and releasing a prisoner who was unconstitutionally denied equal protection *after* the trial. In neither case is the guilt or innocence of the defendant in issue. There is no more reason to believe that a man unconstitutionally denied counsel is innocent than a man who was denied equal protection after conviction. Release after violation of the Fourteenth Amendment is the only means the federal system has of enforcing the Fourteenth Amendment.

Under this question in petitioner's brife counsel have laid great stress on Judge Kerner's dissenting opinion. The respondent respectfully suggests that Judge Kerner was in error when he stated as a reason for his conclusion that by denying Cook's petition for permission to appeal the Supreme Court "held that Cook's imprisonment for the crime of murder was not in violation of the Fourteenth Amendment." This question has been heretofore discussed in respondent's argument.

It is also noted that Judge Kerner stresses the fact that State habeas corpus was denied Cook, affirmed by the Supreme Court of the State, and that certiorari was denied by this Court. It has been held in *Potter v. Dowd*, 146 Fed. 2d 244, that habeas corpus under the statute of Indiana relating thereto is such an inadequate remedy that it is not necessary to exhaust it before proceeding in habeas corpus in a Federal Court. This constricted scope of habeas corpus in Indiana is recognized in *State ex rel Lake v. Bain*, 225 Ind. 505. In view of these holdings it would seem that the State habeas corpus proceeding followed by a denial of certiorari, has nothing to do with this case.

Respondent takes great exception to the extraordinary and drastic relief of freedom granted by the District Court. We respectfully submit it would be more extraordinary and drastic to keep Cook confined the rest of his life when there has been an obvious denial of a substantial right guaranteed him by the Federal Constitution, and after the State of Indiana has continued to deny him that right in every conceivable proceeding he has brought. After all, in all of the efforts Cook has made to either obtain an appeal or to obtain his freedom in Indiana, he has never yet been permitted in any State Court to testify in person or to bring witnesses to testify on his behalf, not to speak of cross-examining adverse witnesses.

To say that the judgment of conviction has never been attacked by petitioner and is valid in all respects is but to beg the question. It is true that no violations of the Fourteenth Amendment occur-

red before judgment. The courts, in rationalizing the right to release on habeas corpus, have frequently stated that the unconstitutional conduct voided the judgment of conviction. When the unconstitutional acts occur after judgment, if broad rationalization is necessary, the Courts can say, with equal logic, that these acts in effect extend back to the rendition of the judgment and make it void. It seems to respondent that the matter should not fall into a class of generalization. The issue is regarding the present detention. If that is made unlawful by unconstitutional acts the only method of enforcing the Fourteenth Amendment is by release of the prisoner. If declaring a judgment of conviction void because of equal protection was denied after its rendition is neither logical nor rational, then logic and rationality alone will open the door to denials of constitutional rights by States after conviction.

The respondent respectfully submits that the denial of Cook's petition for permission to appeal is no barrier to his grant of freedom.

Respectfully submitted,

WILLIAM S. ISHAM,
Attorney for Respondent.

APPENDIX

A

Respondent's Return and Answer

Comes now Ralph Howard, as Warden of the Indiana State Prison, respondent herein, by his attorneys, J. Emmett McManamon, Attorney General, Charles F. O'Connor, Deputy Attorney General, and Merl M. Wall, Deputy Attorney General, and for his return and answer to the writ of habeas corpus says:

1. That he is the duly appointed, acting and qualified Warden of the Indiana State Prison, Michigan City, Indiana, and that he holds custody of the petitioner by virtue of a certain commitment, duly issued out of the Jennings County Circuit Court pursuant to a judgment entered in said court on the 23rd day of July, 1931, legal and valid upon its face, wherein the petitioner was guilty of the crime of first degree murder and was sentenced to imprisonment in the State Prison for the period of his natural life; a copy of said commitment is attached hereto, made a part hereof and marked Exhibit "A."

2. That respondent admits the allegations contained in numerical paragraphs Nos. 3, 4, 10, 11, 12 and 13 of said petition.

3. That respondent denies the allegations contained in numerical paragraphs Nos. 1, 2, 6, 7, 8, 9, 14, 15, 16, 17 and 18 of said petition.

4. That respondent is without information concerning the allegations set forth in numerical paragraph No. 5.

5. That respondent further alleges that he holds custody of the person of the petitioner herein by virtue of the commitment set forth as Exhibit "A" in the first paragraph of this return, and that same is valid upon its face and the term of imprisonment set forth therein has not expired and that petitioner is now lawfully restrained of his liberty by virtue thereof.

WHEREFORE, Respondent requests that the writ herein be dissolved and that the petition be denied and that the custody of the petitioner be remanded to this respondent to be retained by him during the term of said commitment.

J. EMMETT MCMANAMON,
Attorney General
CHARLES F. O'CONNOR,
Deputy Attorney General
MERL M. WALL,
Deputy Attorney Gentral.

B

Indiana Statute

4-3511 (1855). Poor persons—Court may order transcript.—Any poor person desiring to appeal to the Supreme Court or Appellate Court of this state from the decision of any circuit court or criminal court, or the judge thereof, in criminal cases, and not having sufficient means to procure the longhand manuscript or transcript of the evidence taken in shorthand, by the order or permission of any of said courts, or the judge thereof, the court or the judge thereof shall direct the shorthand reporter to transcribe his shorthand notes of evidence into longhand, as soon thereafter as practicable, and deliver the same to such poor person: Provided, The court or the judge thereof is satisfied that such poor person has not sufficient means to pay said reporter for making said longhand manuscript or transcript of evidence, and such reporter may charge such compensation as is allowed by law in such cases for making and furnishing said longhand manuscript, which service of said reporter shall be paid by the court or judge thereof out of the proper county treasury.

C

Chronological Schedule of Facts

July	23, 1931.	Cook convicted. R.p. 178.
July	24, 1931.	Cook taken to Indiana State Prison. R.p. 178.
Oct.	16, 1931.	Motion for new trial overruled. Time the one hundred eighty day period for appeal starts running. R.p. 64.
April	15, 1932.	Time for taking appeal expired. Ind. Acts 1927, P. 421.
June	1933.	New warden (Kunkel) took office. R.p. 158
	1937.	Filed petition for coram nobis.
Apr.	9, 1940.	Warren v. Indiana Telephone Company, decided. 217 Ind. 93.
Nov.	3, 1941.	Indiana Supreme Court affirmed denial of coram nobis. Cook v. State, 219 Ind. 234.
March	17, 1944.	Indiana Supreme Sourt denial of mandate to Jennings Circuit Court, State v. Wilkens, 222 Ind. 365.
Apr.	1945.	Cook filed petition for habeas corpus in La-Porte Circuit Court.
Dec.	13, 1945.	Supreme Court of Indiana affirmed lower court in denial. State v. Howard.
Apr.	22, 1946.	Certiorari denied.
Sept.	13, 1946.	Petition to Supreme Court of Indiana for permission to appeal conviction filed. R.p. 117, 129.
Nov.	26, 1946.	Supreme Court denies petition for appeal. R.p. 173.
March	17, 1947.	Certiorari denied. 330 U. S. 841.
Nov.	13, 1947.	Original petition for habeas corpus filed. R.p. 4.
Oct.	22, 1948.	Amended petition for habeas corpus filed. R.p. 20.
March	10, 1949.	Cook released on order of District Court. R.p. 184.

IN THE
(1950)
SUPREME COURT OF THE UNITED STATES

NUMBER [redacted]66

ALFRED F. DOWD, as Warden
of the Indiana State Prison,
Petitioner,

v.

UNITED STATES OF AMERICA, ex rel.
Lawrence E. Cook,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

J. EMMETT MCMANAMON,
Attorney General of Indiana,

MERL M. WALL,
Deputy Attorney General,

CHARLES F. O'CONNOR,
Deputy Attorney General,

219 State House,
Indianapolis, Indiana,

Attorneys for Petitioner.

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of the Indiana State Prison,
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v.

UNITED STATES OF AMERICA, ex rel.
Lawrence E. Cook,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully requests that a Writ of Certiorari be issued to review a judgment of the U. S. Court of Appeals for the Seventh Circuit affirming the judgment of the U. S. District Court for the Northern District of Indiana, wherein the Respondent, Lawrence E. Cook was discharged from imprisonment in the Indiana State Prison on a Petition for Habeas Corpus.

SUMMARY STATEMENT OF MATTERS INVOLVED

Respondent was adjudged guilty of Murder on the 23rd day of July, 1931, by the Jennings Circuit Court, Jennings County, Indiana, and sentenced to the Indiana State Prison for life. (Record Page 4).

On October 22, 1948, he filed an amended petition for writ of habeas corpus in the United States District Court for the Northern District of Indiana, in which he alleged, in substance, that Warden Daly and other Officers of the Indiana State Prison prevented him from sending appeal documents out of said Prison within the six months period allowed by law to appeal, and that because of said acts, he (the respondent) was deprived of an opportunity to appeal his conviction to the Supreme Court of Indiana, and that said acts constituted a violation of equal protection of the law as guaranteed by the Constitution. (Record Pages 20 to 27, inclusive).

To respondent's petition, petitioner filed a Motion to Dismiss in which it was asserted that the petition shows on its face various matters which precluded the Respondent from a right to relief by Habeas Corpus. Also in said Motion to Dismiss, the petitioner contended that all questions of fact concerning whether or not the Prison Warden and other Officials deprived the Respondent of his right to send out appeal papers, were decided adversely to the Respondent by the Supreme Court of the State of Indiana, and that the whole matter is res judicata. (Record Page 28).

The District Court overruled the Motion to Dismiss, and after a hearing, came to the conclusion that the Re-

spondent's allegations were true, and that he had been prevented from sending out appeal papers. The court believed, that because of said facts, the Respondent's further incarceration is contrary to the equal protection clause of the Constitution. For this reason, and on the authority of *Cockran v. Kansas*, 316 U. S. 244, the District Court ordered that Cook be discharged. (Record Page 178 to 182 inclusive.)

Petitioner appealed to the United States Court of Appeals for the Seventh Circuit; after oral argument, that court (by a two to one decision) affirmed the judgment of the District Court and rendered its opinion on February 7, 1950. Judge Kerner dissented. (Record Page 203 to 210 inclusive.)

Of the judgment rendered by the Circuit Court of Appeals, the petitioner Alfred F. Dowd, requests a review by this Honorable Court on a writ of certiorari.

JURISDICTION

The jurisdiction of this Court is invoked, under the authority of Title 28 U. S. Code, Section 1254(1), to review by certiorari the judgment of the United States Court of Appeals for the Seventh Circuit, and petitioner herein alleges that this Court has jurisdiction of this matter under and by virtue of said statute.

QUESTIONS PRESENTED

1. When a petition for late appeal (based on questions of fact as to whether or not a prisoner was prevented from

taking an appeal) is presented to a State Supreme Court, and said Court denies said petition but is silent as to how it decides the questions of fact, can it not be presumed that the questions of fact were thus decided against the petitioner and have thereby become res judicata so that a Federal District Court should not thereafter hear evidence and again determine these same questions of fact in habeas corpus proceedings?

2. Is a man who is incarcerated under an unquestioned, valid judgment of the State Court entitled to the extraordinary remedy of complete freedom in habeas corpus proceedings in a Federal Court, because of matters occurring subsequent to said judgment?

3. Has a prisoner, who was temporarily prevented from taking appeal, been denied equal protection of the law? In other words, may a convicted prisoner, whose conviction and incarceration is based on an unquestioned, valid judgment, obtain his freedom by habeas corpus, for the reason, that Prison Officials temporarily denied him the right to appeal, or can said right be considered in a state of suspension during the period of disability and then restored when said disability is removed? Can the State remove the disability, and thereby restore the right to an appeal, and thus provide the prisoner with equal protection of the law?

4. If the right to an appeal can be considered in a state of suspension during the period of disability, thus preventing the running of the time limitation thereon, does not the time limitation thereon begin to run at the time that the restraint is removed and when the petitioner obtains knowledge of the removal of such restraint?

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. The first question presented here was decided in the negative by the decision of the Federal District Court and by the Circuit Court of Appeals. We believe that the Federal District Court in hearing evidence on, and determining, the same questions of fact as were presented to the Indiana Supreme Court exercised an appellate function, and reviewed the decision of the Indiana Supreme Court. The Circuit Court of Appeals in affirming the Federal District Court's judgment under these circumstances has sanctioned such a departure from the excepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

2. The second question presented herein was answered in the affirmative by the decision of the Federal District Court and the Circuit Court of Appeals. Judge Kerner disagreed and based his dissent on this question. We believe that this is a question of general importance which has not been, but should be, settled by the Court.

3. The third question presented herein was answered in the affirmative by the decision of the Federal District Court and the Circuit Court of Appeals and said decision further decided that where an appeal is temporarily denied, the right to same has not been suspended; the effect is permanent, and the State is forever precluded from restoring said right. We believe that this decision constitutes a misapplication of the equal protection clause of the Constitution. Whether or not the circumstances presented in this question constitute a violation of the equal protection clause of the Constitution has not been, but should be, settled by this Court.

4. The fourth question presented here was decided in the negative by the decision of the Federal District Court and by the Circuit Court of Appeals. This decision means that under the circumstances of this case the time for taking an appeal is unlimited. Instead of receiving equal protection of the law, a prisoner in these circumstances would receive particular favor and consideration. He could wait until witnesses have died and evidence has been destroyed and then take his appeal; whereas other prisoners must take their appeal within a certain time or they are thereafter barred from so doing. We believe that the Circuit Court of Appeals in affirming the decision of the Federal District Court on this question has sanctioned such a departure from the excepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

WHEREFORE, your petitioner respectfully requests that a Writ of Certiorari be issued out of, and under the seal of, this Honorable Court, directed to the Circuit Court of Appeals of the Seventh District, and that the decision of said court be reversed.

IN THE

SUPREME COURT OF THE UNITED STATES

NUMBER.....

ALFRED F. DOWD, as Warden of the Indiana State Prison,

Petitioner,

v.

UNITED STATES OF AMERICA, ex rel. Lawrence E. Cook,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

REFERENCE TO OPINION OF THE COURT BELOW

The opinion of the Court Below is set forth in full at pages 203 and 209 inclusive in the Transcript of the record and has been officially reported at page 212 of 180 Fed. (2d).

JURISDICTION

This is a petition for writ of certiorari in which this Court is asked to review a decision of the Circuit Court

of Appeals for the Seventh District. The statutory authority for so doing is Title 28, U.S. Code, Section 1254 (1).

STATEMENT OF THE CASE

This brief is filed with, and as a part of, our petition for writ of certiorari, and a summarized statement of the case is on page two (2) herein.

ASSIGNED ERRORS

We believe that the Circuit Court of Appeals by affirming the decision of the Federal District Court erroneously decided the questions which we are presenting to this Court. Said questions are on pages three (3) and four (4) herein and the Court's decisions of these questions are on page five (5) herein.

ARGUMENT

THE FOLLOWING ARGUMENT IS BASED ON THE FIRST OF THE FOUR QUESTIONS PRESENTED IN OUR PETITION FOR WRIT OF CERTIORARI.

The questions of fact presented, by the Respondent, to the Federal District Court, in his petition for Habeas Corpus, are the exact questions which the Respondent presented to the Indiana Supreme Court for its determination. (Record Page 117 et seq.). The Indiana Supreme Court heard the evidence by affidavits submitted by the Respondent and by the State. Without rendering a written opinion concerning these questions, the Court denied the Respondent's petition. Thereafter, the Respondent petitioned for a rehearing in which he again presented these same questions, and the Indiana Supreme Court denied the petition for rehearing. (Record Page 134 et seq.). We believe that the Supreme Court of Indiana considered and adjudicated the merits of Respondent's contentions which were fully set forth in his petition and that the Indiana Supreme Court by denying his petition determined that the allegations thereof were untrue. This constitutes a determination of questions of fact and should be res judicata. A petition for writ of certorari was filed in this Court by the Respondent, and said petition was denied. (*Cook v. Howard* 67 S.Ct. 981).

Since the Indiana Supreme Court has considered and adjudicated the merits of Respondent's contentions, and

This Court has declined to accept certorari, a Federal Court should not reexamine these questions of fact in habeas corpus proceedings.

Mart v. Loinson, 169 Fed. (2d) 116;
Sollinger v. Loisel, 265 U. S. 224;
Wade v. Mayo, 334 U. S. 672.

By assuming jurisdiction and determining the case, under the circumstances of this record, the District Court actually review the case decided by the Indiana Supreme Court, as though the Respondent had appealed. Habeas Corpus can not be made to do service for an appeal.

Burall v. Johnson, 134 Fed. (2d) 614;
Heiman v. Stoutamire, 26 Fed. Supp. 301;
39 C.J.S. "H.C.," Sec. 15 and Notes on Page 447.

THE FOLLOWING ARGUMENT IS BASED ON THE SECOND OF FOUR QUESTIONS PRESENTED IN OUR PETITION FOR WRIT OF CERTIORARI.

Judge Kerner dissented from the majority opinion of the Circuit Court of Appeals and in said dissent stated as follows:

> "I can not agree that a prisoner whose guilt was established by a regular verdict and who has made no contention that the judgment convicting him guilty of murder was void, should escape punishment under the facts in this case."

The Federal District Court and the Court of Appeals relied on the case of *Cockran v. Kansas*, 316 U.S. 244 in

deciding this question. It is believed that the Cockran case is not an authority applicable to this case. This Court received the Cockran case on a direct appeal from the Supreme Court of the State of Kansas, and after exercising its power of review, remanded the case back to the Kansas Supreme Court. The instant case represents an entirely different situation. The Federal District Court is not a review Court and had no authority to remand this case back to the Indiana Supreme Court; therefore, it afforded the petitioner the extraordinary remedy of complete freedom in spite of the fact that there was no contention by anyone concerned that Respondent's conviction of murder was invalid in any respect.

THE FOLLOWING ARGUMENT IS BASED ON THE THIRD OF FOUR QUESTIONS PRESENTED IN OUR PETITION FOR WRIT OF CERTIORARI.

It is believed that no Federal question was presented to the Federal District Court by the Respondent, and that the Federal District Court should have refused jurisdiction. Even assuming, but not conceding, that Prison Officials under Warden Daly prevented the Respondent from sending out appeal papers during 1931 to 1932, the Respondent was not denied equal protection of the law as claimed by him. The record in this case disclosed that the Respondent was incarcerated in 1931, and that Warden Daly's tenure as Warden expired in June 1933. Mr. Kunkel served as Warden from June 1933 to May 1938. The record further disclosed that in 1933 Warden Kunkel called a meeting which was attended by all inmates of the prison except those who were ill or insane and promulgated the

rule that any prisoner who desires to do so could send any writing to any Court or any Lawyer as a special letter at any time. (Record page 157, 158). There is no contention and no evidence whatsoever of any restriction on sending papers to Courts or to Lawyers from the time of Warden Kunkel's meeting in 1933 until the present date.

While it is true that the Respondent testified that he did not attend Warden Kunkel's meeting, he did state that he learned of the rule promulgated at said meeting. He testified, on page 85 of the record, that he learned that Mr. Kunkel permitted papers to go out. It is also to be noted that the petitioner had to be aware that he was not restricted from sending out papers, because the record shows that Cook did prepare and mail a coram nobis petition in October, 1937. (Record page 204; *Cook v. Indiana,* 219 Ind. 234, 37 N. E. (2nd) 63).

We believe that no Federal question is presented for the reason that the petitioner was not denied equal protection of the law. The right to appeal is not a constitutional right, but a statutory one. Since it is a statutory right, all are entitled to it, and to deprive anyone of it would constitute a denial of equal protection of the law. In the instant case even if Cook was prevented from 1931 to 1933 from sending out appeal papers he was not denied equal protection of the law. This is true because if he was so prevented, the time limitation for taking an appeal would not be running against him the entire time he was under this disability. However, the restriction was lifted, and Cook was no longer disabled. The time limitation for taking an appeal (at that time) was six months. This six months' period started to

run either on the day that Warden Kunkel lifted the restriction (in 1933) or it started to run when Cook first had knowledge that the restriction was lifted. When it did start to run he was entitled to a six months' period, which is the exact time allowed, to every other convicted prisoner. Whether this time started to run when Warden Kunkel lifted the restriction or when Cook first had knowledge of that fact, is immaterial. The six months' period, computed from the time Kunkel lifted the restriction, expired sometime in 1934. Cook made no attempt to appeal during that time. We do not know when Cook first became aware of the fact that the restriction was lifted and that he was no longer under disability (if he ever was) but we do know from the record in this case which has been cited herein that the petitioner sent out a petition for writ of error coram nobis in October, 1937. Therefore, he knew at that time that he was under no disability. If the time is computed from October, 1937, it would have expired in 1938, Cook made no attempt to take any appeal during that time.

If Cook was under a disability, the time for taking an appeal would begin to run on the day that said disability was removed. On that day Cook would occupy the same status as a prisoner who was convicted on that same day; viz., each would have exactly six months in which to take an appeal. It is a matter of common knowledge that most prisoners do not appeal from their convictions; when they do not appeal within the time provided for so doing they waive their right to do so.

Assuming that the State prevented Cook from taking an appeal, said prevention would not constitute a *denial* of equal protection of the law because the right was subse-

quently restored. The State of Indiana (assuming that Cook was restrained) did no more than temporarily *suspend* Cook's right to appeal. However, said right was restored to him and he was permitted a full six months' period in which to perfect an appeal, said period of time is equal to that afforded any other prisoner, and Cook by not presenting an appeal, waived his right to do so.

THE FOLLOWING ARGUMENT IS BASED ON THE FOURTH OF THE FOUR QUESTIONS PRESENTED IN OUR PETITION FOR WRIT OF CERTIORARI.

The decision of the Federal District Court and the Court of Appeals has the effect of telling the State of Indiana that it owed Cook the opportunity to perfect an appeal at the time that the case was heard by the Federal District Court, and that the failure to grant same is a denial of the equal protection clause of the Constitution. If the State is under this obligation, the petitioner would have considerably more that equal protection of the law; he would be in a position of favor. While everyone else has a time limitation for an appeal, the Respondent's time would remain unlimited.

The Respondent filed his coram nobis action in October of 1937. It was not until 1945 that he brought any legal action based on the alleged suppression of appeal papers. This was filed in the LaPorte County Indiana Circuit Court as a habeas corpus action. After a full and complete hearing, the LaPorte Circuit Court denied the Respondent's petition.

For each and all of the above reasons the petitioner believes that the decision of the Federal District Court and of the Circuit Court of Appeals was erroneous, and for each and all of the above reasons the petitioner believes that the questions presented in this case are such as should be decided by this Court.

Respectfully submitted,

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